

(24,369)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 625.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO,  
APPELLANT,

vs.

PAUL I. WELLES, JOHN DANIEL, TRUSTEE OF METROPOLIS CONSTRUCTION COMPANY, BANKRUPT, AND THOMAS F. BOYLE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.

INDEX.

	Page
Caption .....	6
Transcript from the district court of the United States for the northern district of California.....	1
Appearances .....	1
Præcipe for record.....	2
Supplemental præcipe for record.....	5
Præcipe of Portuguese-American Bank as to record.....	6
Bill of complaint.....	7
Exhibit "A"—Agreement between the Metropolis Construction Co. and City and County of San Francisco, July 22, 1910....	25
Exhibit "B"—Agreement between Paul I. Welles and the City and County of San Francisco, July 30, 1910.....	28
Exhibit "C"—Stop notice and notice of claim.....	31
Exhibit "D"—Amended stop notice and notice of claim.....	37
Order to show cause.....	45
Marshal's return on order to show cause.....	46

	Page
Amendments to bill of complaint.....	48
Return of Portuguese-American Bank.....	50
Amended return of Portuguese-American Bank.....	51
Exceptions to amended return of Portuguese-American Bank.....	62
Amended return to order to show cause and answer of Thomas F. Boyle .....	64
Exhibit "A"—Notice of surety company, December 15, 1910...	68
Exhibit "B"—Letter to Thomas F. Boyle from Gavin McNab, December 18, 1910.....	70
Exhibit "C"—Notice of casualty company, February 3, 1911...	71
Exhibit "D"—Letter to Thomas F. Boyle, March 15, 1911.....	73
Exhibit "E"—Notice of Portuguese-American Bank, December 17, 1910 .....	74
Exhibit "F"—Notice of Metropolis Construction Co., December 5, 1910 .....	75
Replication to answer of Thomas F. Boyle.....	76
Order referring case to referee, etc.....	78
Order restraining Portuguese-American Bank from prosecuting mandamus proceedings .....	78
Answer of John Daniel, trustee, etc.....	79
Answer of Portuguese-American Bank.....	81
Report of referee.....	92
Replication to answer of Portuguese-American Bank.....	111
Replication to answer of John Daniel, trustee, etc.....	112
Memorandum opinion confirming report of referee, etc.....	113
Order confirming report and findings of referee, etc.....	114
Order confirming report of referee granting complainant an injunction <i>pendente lite</i> , etc.....	115
Writ of injunction and mandamus.....	116
Marshal's return to writ.....	119
Order of reference for final hearing.....	119
Order referring cause to referee, etc.....	120
Report of referee, March 8, 1912.....	120
Exceptions of Portuguese-American Bank to referee's report.....	125
Order allowing amendment to prayer of bill of complaint.....	127
Order referring cause to special referee and examiner to report facts .....	128
Amendment to prayer of bill of complaint.....	128
Stipulation as to amendment to prayer of bill of complaint.....	131
Report of referee, July 16, 1912.....	132
Exceptions of Paul I. Welles to report of special referee and examiner .....	172
Exceptions of John Daniel, trustee, etc., to report of special referee and examiner .....	180
Order submitting exceptions to report of special referee and examiner .....	181
Order setting aside submission and restoring case to calendar.....	182
Order resubmitting case.....	182
Opinion, Dietrich, J.....	183
Order confirming report of referee and directing entry of decree, etc.	185
Decree .....	186
Petition for appeal by John Daniel, trustee, etc.....	189
Notice of petition by trustee in bankruptcy for severance of appeal.	190



# INDEX.

iii

	Page
Assignment of errors by John Daniel, trustee, etc.....	192
Petition for appeal by complainant.....	198
Assignment of errors by Paul I. Welles, complainant.....	200
Consent of complainant Welles to unite with Daniel, trustee, in appeal .....	206
Order granting appeal severing codefendants and allowing supersedeas .....	207
Bond on appeal.....	208
Citation .....	210
Marshal's return on citation.....	211
Statement of proceedings and testimony.....	212
Testimony of Thomas F. Boyle.....	212
Bill of Metropolis Construction Co. against City and County of San Francisco, December 5, 1910, with affidavits, endorsements, etc. ....	213
Letter to Board of Public Works from Marsdon Manson, city engineer, December 3, 1910.....	217
Testimony of Chris Emille.....	221
Letter to Thomas F. Boyle from Metropolis Construction Co., December 5, 1910.....	222
Testimony of Chris Emille (recalled).....	226
L. F. Strong.....	229
M. T. Freitas.....	235
V. L. De Figueiredo.....	242
John B. Lewis.....	250
L. V. De Figueiredo (recalled).....	251
James B. Feehan.....	254
J. L. McCormick.....	255
Defendant Portuguese-American Bank Exhibit No. 1—Resolution No. 8401, passed by the Board of Public Works December 5, 1910.....	256
Defendant Portuguese-American Bank Exhibit No. 2—Resolution No. 8399, passed by the Board of Public Works December 5, 1910.....	257
Defendant Portuguese-American Bank Exhibit No. 3—Resolution No. 8400, passed by the Board of Public Works December 5, 1910.....	258
Defendant Portuguese-American Bank Exhibit No. 4—Resolution passed by the Metropolis Construction Co.....	259
Defendant Portuguese-American Bank Exhibit No. 5—Letter dated San Francisco, December 17, 1910, from Portuguese-American Bank of San Francisco to Thomas F. Boyle .....	260
Defendant Portuguese-American Bank Exhibit No. 6—Letter dated San Francisco, November 19, 1910, from Metropolis Construction Co. to Thomas F. Boyle.....	261
Stipulation approving engrossed statement of proceedings and testimony .....	273
Order approving and allowing engrossed statement of proceedings and testimony .....	273
Clerk's certificate .....	274
Citation and service.....	275

	Page
Order enlarging time for filing record and docketing case.....	278
Order enlarging time to May 7, 1913, for filing record and docketing case .....	279
Order enlarging time to May 12, 1913, for filing and docketing case.....	279
Stipulation as to printing record.....	280
Supplemental transcript of record.....	281
Caption .....	281
Order on motion for writ of certiorari for diminution of the record, etc. ....	283
Excerpt from specifications forming part of contract between the Metropolitan Construction Co. and the board of public works of the city and county of San Francisco, State of California (annexed to claim of Paul I. Welles).....	284
Certificate of referee to specifications, etc.....	308
Certificate of clerk of the United States district court to copy of certified copy of that part of specification called "General Provisions," etc. ....	309
Caption .....	312
Order of submission.....	312
Order directing filing of opinion and recording of decree.....	313
Opinion .....	313
Decree .....	319
Order directing filing of opinion and entry of order denying petition for rehearing .....	320
Opinion, Gilbert, J., on petition for rehearing.....	320
Order denying petition for rehearing and staying issuance of mandate.....	322
Notice of petition for appeal and severance.....	322
Petition for appeal.....	324
Assignment of errors.....	325
Order allowing appeal and severance and fixing bond.....	327
Bond on appeal.....	328
Præcipe for record.....	330
Clerk's certificate .....	331
Citation and service.....	331

No. 2273

---

United States  
**Circuit Court of Appeals**  
For the Ninth Circuit.

---

PAUL I. WELLES and JOHN DANIEL, Trustee of  
METROPOLIS CONSTRUCTION COMPANY, a  
Corporation, Bankrupt,

Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRAN-  
CISCO, a Corporation,

Appellee.

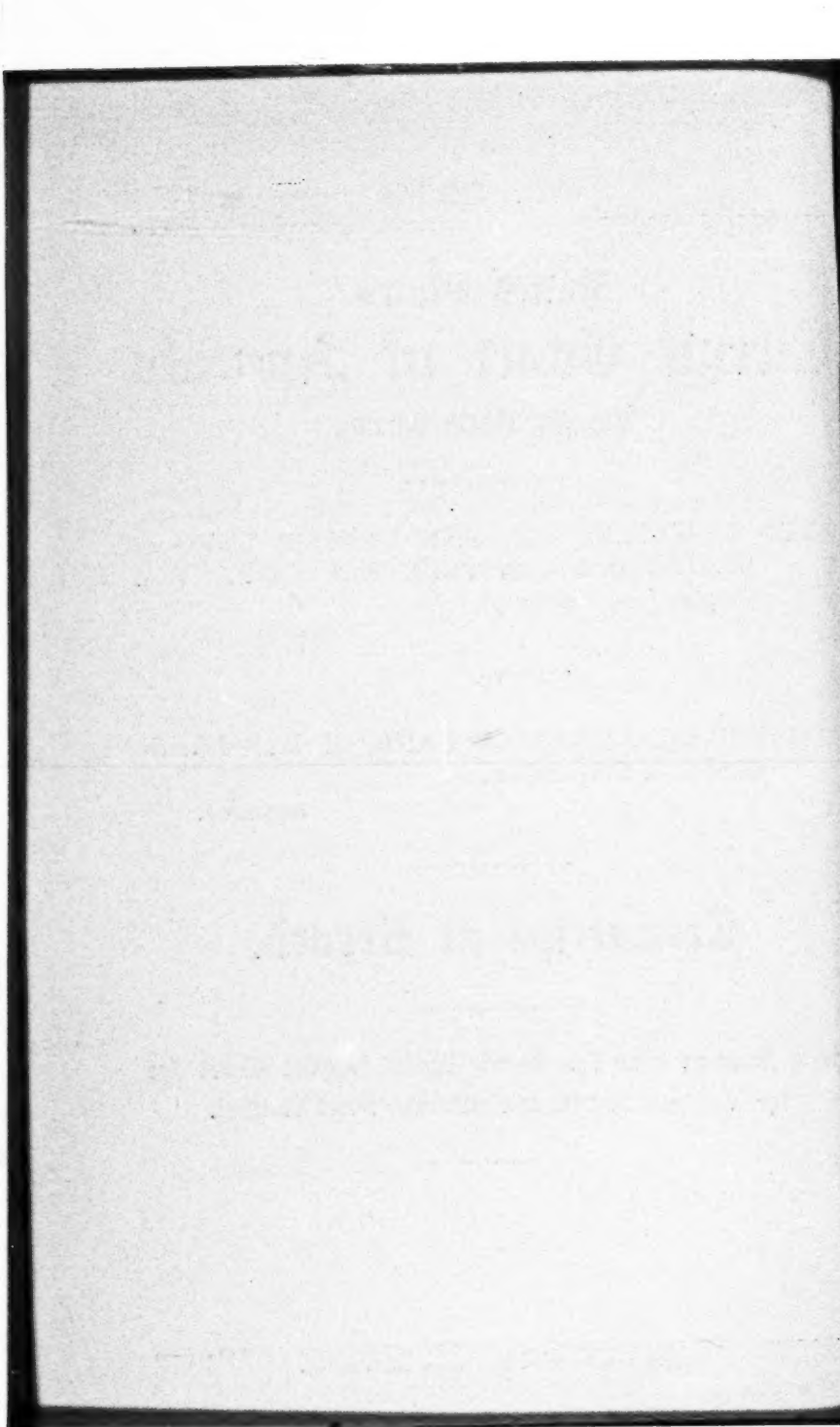
---

**Transcript of Record.**

---

Upon Appeals from the United States District Court for  
the Northern District of California, First Division.

---



**Names and Addresses of Attorneys of Record.**

C. A. S. FROST, Humboldt Bank Building, San Francisco, California,

Counsel for Appellant Paul I. Welles.

A. F. MORRISON, P. F. DUNNE and W. I. BROBECK, Crocker Building, San Francisco, California; GAVIN McNAB, Merchants National Bank Building, San Francisco, California; B. M. AIKINS, Metropolis Bank Building, San Francisco, California, and MILTON J. GREEN, Mills Building, San Francisco, California,

Counsel for Appellant John Daniel, Trustee, etc.

KNIGHT & HEGGERTY, Crocker Building, San Francisco, California; JAMES B. FEEHAN, Humboldt Bank Building, San Francisco, California, and JOSEPH W. BERETTA, Humboldt Bank Building, San Francisco, California, Counsel for Appellee.

---

*In the District Court of the United States, in and for  
the Northern District of California.*

No. 15,148.

PAUL I. WELLES,

Complainant,

VS.

JOHN DANIEL, Trustee of the Estate of METROPOLIS CONSTRUCTION COM-



PANY, a Corporation, Bankrupt, PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, and THOMAS F. BOYLE,

Defendants.

**Praeceptum [for Transcript of Record].**

To the Clerk:

You are requested to make a Transcript of Record, to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal granted in the above-entitled cause, and to include in said Transcript of Record the following papers and exhibits:

1911.

April 18. Bill of Complaint.

" 19. Order to Show Cause.

May 24. Amendments to Bill of Complaint.

June 20. Return of Portuguese-American Bank.

" 27. Amended Return of Portuguese-American Bank.

July 3. Exceptions to Amended Return of Portuguese-American Bank.

" 3. Amended Return and Answer of Thomas F. Boyle. [1\*]

1911.

July 11. Order Case Referred to A. B. Kreft, etc.

" 11. Replication of Complainant to Answer of Thomas F. Boyle.

1911.

Sept. 5. Answer of John Daniel, Trustee, etc.

Oct. 6. Answer of Portuguese-American Bank.

\*Page-number appearing at foot of page of original certified Record.

- Oct. 14. Report of Referee.  
Statement of Evidence Taken Before  
Referee (filed herewith and to be set-  
tled).
- " 16. Replication of Paul I. Welles to Answer  
of Portuguese-American Bank.
- " 25. Replication of Paul I. Welles to Answer  
of John Daniel.
- Dec. 12. Order Complainant Entitled to Relief  
Demanded.
- " 13. Order Approving Report.
- " 18. Writ of Injunction and Return.
- " 26. Order Case Referred to A. B. Kreft.
- 1912.
- Mch. 8. Report on Reference.
- Apl. 15. Order Cause Referred to A. B. Kreft.
- " 15. Amendment to Prayer of Bill.
- " 15. Order Allowing Amendment to Prayer  
of Bill.
- July 16. Report of Special Referee.
- Aug. 14. Exceptions of Paul I. Welles.
- " 16. Exceptions of John Daniel.
- Sept. 4. Order Submitting Report and Excep-  
tions in Briefs. [2]
- 1912.
- Dec. 19. Order Submission Set Aside and Cause  
Restored to Calendar.
- 1913.
- Jan. 18. Order Cause Submitted on Briefs on File.
- " 18. Opinion Confirming Report of Referee.
- " 18. Order Report Confirmed in Favor of  
Portuguese-American Bank.

Jan. 30. Decree.

Feb. 4. Notice of Petition for Severance.

" 4. Petition for Appeal of John Daniel,  
Trustee.

" 4. Assignment of Errors of John Daniel,  
Trustee.

1913.

Feb. 8. Petition of Paul I. Welles for Appeal.

" 8. Assignment of Errors of Paul I. Welles.

" 8. Consent of Paul I. Welles to Unite in  
Appeal.

" 10. Order Granting Appeal, Severance, and  
Allowing Supersedeas.

" 13. Bond of Complainant on Appeal, with  
Order Approving Same,

A. F. MORRISON,

P. F. DUNNE,

W. I. BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for John Daniel, Trustee, etc., Defendant  
and Appellant. [3]

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant and  
Appellant.

Receipt of a copy of the within Praecepte this 20th day of February, 1913, is admitted.

**JAMES B. FEEHAN,  
KNIGHT & HEGGERTY,**

Attorneys for Defendant Portuguese-American Bank.

**EDWARD F. MORAN,**  
Attorney for Defendant Thomas F. Boyle.

Filed Feb. 21, 1913. [4]

---

[Title of Court and Cause.]

**Supplemental Praecepte [for Transcript of Record].**

To the Clerk:

You are requested to include in the Transcript of Record, made by you, to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to the Appeal granted in the above-entitled cause, the following papers:

May 1, 1911. Return of United States Marshal on Order to Show Cause.

July 11, 1911. Order Restraining Portuguese-American Bank from Prosecuting Mandamus Proceedings.

December 13, 1911. Order Granting Complainant Injunction *pendente lite*, etc.

December 26, 1911. Minute Order, Referring Cause to Referee upon the Issues Arising upon the Pleadings.

April 15, 1912. Order Referring Cause to Special Referee and Examiner to Report on Testimony Taken, etc.

February 10, 1913. Citation and Return.

A. F. MORRISON, [5]

P. F. DUNNE,

W. I. BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for John Daniel, Trustee, etc., Defendant and Appellant.

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant and Appellant.

A copy of the within paper received this 8th day of May, 1913.

KNIGHT & HEGGERTY,

JAMES B. FEEHAN,

Attorneys for the Defendant and Respondents.

Filed May 10th, 1913. [6]

---

[Title of Court and Cause.]

**Praecept of Portuguese-American Bank [as to Transcript of Record].**

To the Clerk:

You are requested to incorporate into the Transcript of Record on appeal in the above-entitled matter the following papers and exhibits:

Exceptions of Defendant Portuguese-American Bank of San Francisco to Referee's Report on Final



Hearing filed April 6th, 1912.

Defendant Portuguese-American Bank's Exhibits 1, 2, 3, 4, 5 and 6, accompanying report of Referee dated October 16, 1911.

March 3d, 1913.

**KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,**

Solicitors for Portuguese-American Bank of San Francisco, Defendant and Appellee. [7]

Received a copy of the within Praecipe this 3d day of March, 1913.

**MORRISON, DUNNE & BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
M. J. GREEN,**

Attorneys for John Daniel.

**C. A. S. FROST,**

Attorney for Paul I. Welles.

Filed Mar. 3, 1913. [8]

---

[Title of Court and Cause.]

**Bill of Complaint.**

(By Claimant in Bankruptcy Against Trustee in Bankruptcy, a Stakeholder and Alleged Equitable Assignee; to Collect Stake Adjudicate Priorities, and Enjoin Summary Proceeding in State Court.)

To the Honorable District Court of the United States for the Northern District of California, and to the Honorable JOHN J. DE HAVEN, Judge of said Court:

The Bill of Complaint of Paul I. Welles, a citizen

of the United States and of the State of California, and a resident of Berkeley, in the Northern District of said State, against John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, Defendants, respectfully shows:

I.

That complainant is a citizen of the United States and of the State of California and a resident of Berkeley in the Northern District of said State; that he is a party to the [9] bankruptcy proceedings hereinafter mentioned, and has filed therein his claim as a secured creditor; and that said claim has been approved and allowed.

II.

That the City and County of San Francisco is, and, at all the times herein mentioned, continuously, has been a municipal corporation of the State of California duly organized and existing under and governed by a certain Charter adopted by the people of said City and County on the 26th day of May, 1898, and approved by the Legislature of the State of California on the 26th day of January, 1899; and that Thomas F. Boyle, defendant herein is, and, at all the times herein mentioned, continuously, has been the duly elected, qualified and acting Auditor of said City and County of San Francisco.

III.

That Metropolis Construction Company is, and at all the times herein mentioned continuously has been a corporation organized and existing under and by

virtue of the laws of the State of California.

IV.

That a petition praying that Metropolis Construction Company, a corporation, be adjudged bankrupt was duly and regularly filed in the District Court of the United States for the Northern District of California on December 19th, 1910; that thereafter and on January 5th, 1911, said corporation was, by order of said Court herein, duly given and made, adjudged bankrupt; and thereafter and on said last mentioned day the matter of said bankruptcy was, by said Court, by its order duly given and made, referred to the Honorable Armand B. Kreft, Referee in Bankruptcy herein. [10]

That, on February 1st, 1911, at the first meeting of creditors, duly and regularly called and held before said Referee in Bankruptcy, John Daniel was appointed Trustee of the estate of said bankrupt by order of said Referee; that thereafter and on said February 1st, 1911, said John Daniel made and filed herein his oath of office and the bond required by law and the order of said Referee as such trustee; that he thereupon became, ever since continuously has been, and now is the duly appointed, qualified and acting Trustee of the estate of said bankrupt.

V.

That defendant, Portuguese-American Bank of San Francisco, is a banking corporation duly organized, acting and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California.

## VI.

That on or about the 22d day of July, 1910, the City and County of San Francisco entered into a contract with said Metropolis Construction Company for the construction of certain sewers and appurtenances in Kentucky Street, from Channel Street South, in said City and County of San Francisco; a copy of said contract is hereunto annexed, marked Exhibit "A" and made part hereof.

## VII.

That thereafter the Metropolis Construction Company proceeded with the construction work under said contract, and on the 5th day of September, 1910, the City Engineer of said City and County of San Francisco made an estimate of the value [11] of the labor done and materials incorporated in said sewers and appurtenances since his last preceding estimate thereof was made, and he estimated the same at Nine Thousand One Hundred Seven and Eighty One Hundredths (\$9107.80) Dollars, and thereupon the sum of Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6830.85) Dollars, being seventy-five per cent (75%) of said Nine Thousand One Hundred Seven and Eighty One Hundredths (\$9107.80) Dollars, became due subject to the terms of said contract and laws of California to said Metropolis Construction Company from said City and County of San Francisco as a progressive payment on account of said contract; that said payment is called the fourth (4th) progressive or progress payment; that the Board of Public Works of the City and County of San Francisco approved said

estimate on the 5th day of December, 1910, by its resolution then and there duly made and adopted.

That said Metropolis Construction Company presented its verified demand on the treasury of said City and County of San Francisco for said sum of Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars; that said demand was approved by said Board of Public Works on December 5th, 1910; that thereafter, on January 3d, 1911, the Board of Supervisors of said City and County of San Francisco, by resolution of said Board duly and regularly adopted, approved said demand and authorized the payment thereof to be made out of the fund provided by law; that thereafter and on January 4th, 1911, said demand was approved by the Mayor of said City and County.

That said demand upon the treasury and the payment thereof has been allowed by every officer, board, department and committee required by law to act thereon. [12]

That said demand upon the treasury was presented to said defendant Thomas F. Boyle as Auditor of said City and County of San Francisco on or about January 6th, 1911, and is now in the possession of said defendant for his approval and allowance; that, prior to the commencement of this action, defendant Trustee made demand upon said defendant Boyle that he approve and allow said demand and deliver the same to defendant Trustee; that said defendant Boyle has failed and refused, and still fails and refuses, to approve or allow said demand or to deliver the same to defendant Trustee; that he has not any



good or sufficient reason for so doing; on the contrary, that neither said Thomas F. Boyle individually or as Auditor of said City and County of San Francisco, or said City and County of San Francisco, nor any officer, agent or department thereof has or asserts any claim whatever upon said demand or to said sum of Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars, or any part thereof, nor any offset nor counterclaim thereto; and that the sole and only reason why said demand, and its proceeds, said Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars, is not immediately delivered by defendant Boyle to said defendant Trustee is that there exists some doubt in the mind of defendant Boyle as to whether said Trustee or complainant or said defendant bank is the one rightfully entitled thereto.

That defendant Trustee is legally entitled to the possession of said fund, subject to whatever rights therein said complainant or defendant bank may have. [13]

#### VIII.

That thereafter the construction work under said contract was continued and finally completed February 1st, 1911; that thereafter and prior to filing this Bill of Complaint the City Engineer of said City and County of San Francisco made an estimate of the value of the labor done and materials incorporated in said sewers and appurtenances since his last preceding (the said fourth) estimate thereof was made including the twenty-five (25) per cent withheld un-

der said contract, and he estimated the same at Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars, and thereupon said sum of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars, being the amount of the fifth (5th) progress payment and also the final payment, under said contract, became due subject to the conditions and laws aforesaid, to said Metropolis Construction Company from said City and County of San Francisco; that the Board of Public Works of the City and County of San Francisco approved said estimate and finally accepted said construction work on the 29th day of March, 1911, by its resolution then and there duly made and adopted.

That said Metropolis Construction Company presented its verified demand on the treasury of said City and County of San Francisco for said sum of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars; that said demand was approved by said Board of Public Works on March 29, 1911, that thereafter, on April 10, 1911, the Board of [14] Supervisors of said City and County of San Francisco, by resolution of said Board duly and regularly adopted, approved said demand and authorized the payment thereof to be made out of the fund provided by law; that thereafter and on April 11, 1911, said demand was approved by the Mayor of said City and County.

That said demand upon the treasury and the payment thereof has been allowed by every officer, board,

department and committee required by law to act thereon.

That said demand upon the treasury was presented to said Thomas F. Boyle as Auditor of said City and County of San Francisco on or about April 12, 1911.

That thereafter and prior to the filing of this Bill of Complaint said Trustee in Bankruptcy, John Daniel, defendant herein, made demand upon said Auditor that he approve and allow said demand of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars and deliver the same to said Trustee; that then and there said Auditor delivered said demand to said Trustee, who immediately received the money therefor from the Treasurer of said City and County; and that said sum of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars, and the whole thereof, then immediately passed into the possession of said Trustee, who thereupon paid out said sum as follows: The sum of Five Thousand Three Hundred Sixty-seven and Forty-three One Hundredths (\$5,367.43) Dollars in satisfaction of, and which did satisfy, all claims against any and all said moneys payable by said City and County to said bankrupt and in the hands of defendant Boyle, save the claims of complainant and the alleged assignment of defendant bank, and the balance of said sum, to wit: Five Thousand Seven Hundred Eighty-two and Twenty-one One Hundredths (\$5,782.21) Dollars to complainant [15] on account of said bankrupt's indebtedness to him; all persons having claims or liens against said moneys

in the hands of defendant Boyle save said Bank, having consented in writing, and they did consent, to the transfer of all said funds to defendant Trustee.

IX.

That no person, firm nor corporation has or asserts any claim, right or offset or counterclaim whatever to said demands or moneys, or any part thereof, save only complainant, said Trustee defendant and Portuguese-American Bank of San Francisco, defendants herein.

X.

That said defendant, Portuguese-American Bank of San Francisco, claims some right to said moneys by virtue of an alleged assignment thereof from said bankrupt; but that, defendant bank has no assignment, as complainant is informed and believes and, therefore, alleges, and no right whatever to said moneys nor any part thereof.

XI.

That said contract, dated July 22, 1910, between said City and County of San Francisco and said bankrupt, contained specifications, a complete copy whereof is annexed to complainant's verified claim on file in said bankruptcy proceedings, but which are too voluminous to repeat here, which said specification contains, among other things, the following provisions:

In order to assist the contractor to prosecute the work advantageously, the City Engineer, shall on or about the last day of each month, make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

The first estimate shall be of the value of the labor [16] done and materials incorporated into the herein proposed work since the contractor commenced the performance of the contract on his part, and every subsequent estimate except the final estimate shall be of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be made, when in the judgment of the City Engineer the total value of the labor done and materials incorporated into the herein proposed work since the last preceding estimate amounts to less than \$15,000.00. Such estimate need not be made by strict measurements, but they may be approximate only and shall be based upon the whole amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer's estimate.

Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contractor is not complying with the requirements of the contract and specifications.

No sub-contract shall relieve the contractor of any liabilities or obligations. He shall not, either legally or equitably, assign any of the moneys payable un-



der this contract or his claim thereto, unless with the like consent of the Board of Public Works. [17]

XIa.

That said Board of Public Works never gave consent to any assignment of defendant bank.

XII.

That on July 30, 1910, said Metropolis Construction Company, a corporation made and entered into an agreement, with complainant, wherein and whereby it was then and there agreed that complainant was to do all of the construction work in said sewers and appurtenances for a price therein agreed to be paid complainant; a copy of said agreement of July 30, 1910, is annexed hereto, marked "Exhibit B" and made part hereof.

XIII.

That said Paul I. Welles has completed the construction of said sewers and appurtenances at Fourth and Kentucky Streets and that he has fully complied with all the terms and conditions of his said agreement with said bankrupt, and also all the terms and conditions of the agreement between said bankrupt and said City and County for the construction of said sewers and appurtenances by said bankrupt agreed to be kept and performed; that said work has been approved and accepted by the said City and County of San Francisco.

XIV.

That there now remains due and owing said Paul I. Welles from said Metropolis Construction Company the sum of \$19,844.65; that said last-mentioned sum is not subject to any setoffs or any counterclaims

on behalf of said bankrupt save certain moneys as are now due and owing from said Welles [18] to said bankrupt for said materials purchased by said Welles from said bankrupt, namely \$6,834.39; that said last-mentioned offset is subject to deductions on behalf of said Welles in certain amounts which have been paid or which must be paid out of the moneys due from said City and County for the construction of said sewers to materialmen who served notices to withhold, under said section 1184, upon said City and County, amounting to the sum of \$5,367.42; and that there is now due and owing said Paul I. Welles from said bankrupt, after said notices to withhold shall be paid, \$14,477.23, free from all setoffs or counter-claims whatsoever; except as above stated, and the payment on April 14, 1911, of the sum of Five Thousand Seven Hundred Eighty-two and Twenty-one One Hundredths (\$5,782.21) Dollars, mentioned in paragraph VIII hereof.

XV.

That on December Tenth, Nineteen Hundred Ten, complainant made a written notice to the owner, the said City and County of San Francisco, and to the Mayor and Board of Supervisors and Board of Public Works thereof, and to said bankrupt, that he had performed labor and furnished labor and materials to said bankrupt, and had agreed so to perform and furnish, stating in general terms the matters and things required to be stated in such a notice by section number One Thousand One Hundred Eighty-four (1184) of the Code of Civil Procedure of the State of California to which reference is hereby

made, a copy of which said notice is annexed hereto, marked "Exhibit C" and made part hereof.

That said written notice was served upon said City [19] and County, and upon said Board of Supervisors, and upon said Mayor, and upon said Board of Public Works and upon said bankrupt, and upon the Auditor of said City and County on December Twelfth (12th) 1910.

#### XVI.

That on December Fifteenth, Nineteen Hundred Ten, complainant made a written notice, called "Amended Stop Notice and Notice of Claim of Paul I. Welles," to said owner, said City and County of San Francisco, and to the officers, boards and corporation, mentioned in the paragraph XV, last preceding, similar in form and substance to the written notice mentioned in said paragraph XV, a copy of which said notice is annexed hereto, marked "Exhibit D" and made part hereof;

That said "amended" notice was served upon said City and County and upon said Mayor and upon said Board of Supervisors, and upon said Board of Public Works, and upon the Auditor of said City and County on December Sixteenth (16th), 1910, and upon said bankrupt on December Twenty-second (22d), 1910.

#### XVII.

That on March First, Nineteen Hundred Eleven, complainant made, verified and filed herein before said Honorable A. B. Kreft, Referee in Bankruptcy, his claim against said bankrupt, alleging and stating said contract, indebtedness, notices, service of

same, and securities, claiming priority as a secured creditor, to which reference is hereby made.

That on April Thirteenth, Nineteen Hundred Eleven, [20] said claim was by said Referee allowed and approved as a secured claim against said bankrupt, and its estate, in the sum of Nineteen Thousand Eight Hundred Forty-four and Sixty-five One *Hundred* (\$19,844.65) Dollars, subject to offset in favor of said bankrupt as stated in paragraph number XIV hereof.

#### XVIII.

That the total amount of money remaining available on said contract, part of which (\$11,149.64) is in possession of defendant Trustee and part in possession of defendant Boyle for account of said bankrupt, is Seventeen Thousand Nine Hundred Eighty and Forty-nine One Hundredths (\$17,980.49) Dollars, which is insufficient to pay the claim of complainant against said bankrupt in full; and that complainant is entitled, by virtue of said prior right, to the whole thereof; but that defendant Trustee denies said claim in part, and asserts that he is entitled thereto for the general creditors of said bankrupt.

#### XIX.

That out of said Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars received by said Trustee, as alleged in paragraph VIII hereof, all claims against said fund, whatsoever, have been paid and discharged, save only said claim of said defendant, Portuguese-American Bank of San Francisco, as alleged, also, in paragraph XIV hereof.

XX.

That the charter of the City and County of San Francisco, to which reference is hereby made, provides, among other things: [21]

Art. II—Chap. I—Sec. 13.

Every bill or resolution providing for any specific improvement, or the granting of any franchise or privilege, or involving the lease, appropriation or disposition of public property, or the expenditure of public money, except sums less than two hundred dollars, or levying any tax or assessment, and every ordinance providing for the imposition of a new duty or penalty, shall, after its introduction, be published in the official newspaper, with the ayes and noes, for at least five successive days (Sundays and legal holidays excepted) before final action upon the same. If such bill be amended, the bill as amended shall be in cases of great necessity the officers and heads of departments may, with the consent of the Mayor, expend such sums of money, not to exceed two hundred dollars, as shall be necessary to meet the requirements of such necessity.

Art. II—Chap. I—Sec. 19.

Except as provided in Chapter III of Article III of this Charter, all demands payable out of the treasury must, before they can be approved by the Auditor or paid by the Treasurer, be first approved by the Board of Supervisors. All demands for more than two hundred dollars shall be presented to the Mayor for his approval, in the manner hereinbefore provided for the passage of bills or reso-



lutions. All resolutions directing the payment of money other than salaries of wages, when the amount exceeds five [22] hundred dollars, shall be published for five successive days (Sundays and legal holidays excepted) in the official newspaper.

Art. III—Chap. I—Sec. 15.

The Supervisors shall authorize the disbursement of all public moneys, except as otherwise specifically provided in this Charter.

Art. IV—Chap. I—Sec. 3.

\* \* \* \* \*

The Mayor shall from time to time recommend to the proper officers of the different departments such measures as he may deem beneficial to public interest. He shall see that the laws of the State and ordinances of the City and County are observed and enforced. He shall have a general supervision over all the departments and public institutions of the City and County, and see that they are honestly, economically and lawfully conducted, and shall have the right to attend the meetings of any of the Boards provided for in this Charter, and offer suggestions at such meetings.

Art. VI—Chap. I—Sec. 7.

The Board\* shall be the successor in office and shall have all the powers and perform all the duties of the Superintendent of Streets, Highways, and Squares, of the New City Hall Commissioners, and of the commission in existence at the time this Charter goes [23] into effect for the opening, extending, widening, narrowing, straightening, (\*of Public Works.)



closing or changing the grades of streets in the City and County.

XXI.

That on or about the 26th day of January, 1911, said Portuguese-American Bank of San Francisco made and filed in the Superior Court of the State of California, in and for the City and County of San Francisco, its petition wherein and whereby it set forth its alleged claim to the possession of said demands and the proceeds thereof, and wherein and whereby it prayed that said Thomas F. Boyle be required to deliver possession thereof to it; that said petition is numbered 33836 in the records and files of said Superior Court; that thereupon said Superior Court gave and made its alternative mandate directed to said Thomas F. Boyle as Auditor of said City and County of San Francisco, requiring him immediately to audit and approve said demands and to deliver the same to said Portuguese-American Bank of San Francisco, a corporation, or to show cause before said Superior Court, on the 9th day of February, 1911, at 10 o'clock A. M., why he had not done so; that thereafter and on said 9th day of February, 1911, the said proceeding was continued upon the motion of said Portuguese-American Bank of San Francisco, a corporation, until the 19th day of April, 1911, at 10 o'clock A. M., at which time said Thomas F. Boyle is required to appear and to do as in said alternative writ of mandate commanded.

That said application for a writ of mandate is a summary proceeding and that said State Court has

no jurisdiction therein to hear nor determine conflicting claims to said funds [24] and that neither complainant nor said Trustee is a party to said mandamus proceeding.

WHEREFORE, complainant prays that defendant Boyle, as Auditor, be required to surrender to defendant Trustee said Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars, the fourth progress payment, now held by him for account of said bankrupt; that said defendant Trustee on behalf of said bankrupt, be required to account fully and finally with complainant; that defendant, Portuguese-American Bank, be required, by due process of this court, to make answer hereunto and to assert herein its claim, if any it have, upon said moneys and to abide the judgment and decree of this Court herein to be determined thereon; that said defendant bank, its attorneys, agents and servants be perpetually enjoined from further proceeding with said application for a writ of mandamus in said Superior Court of the State of California; and that said defendant bank, in the meantime, be restrained from further proceeding with said mandamus application until the further order of this Court; and for an order directing said defendant bank in that behalf to show cause, if any it have, at a time and place therein to be stated, why it should not be so restrained; and for such other and further relief as may be according to equity and good

conscience; and that complainant be allowed his costs and disbursements herein by him expended.

Dated: San Francisco, April 17, 1911.

PAUL I. WELLES,  
Complainant.

C. A. S. FROST,  
Attorney for Complainant. [25]

[Duly verified April 17, 1911.] [26]

**Exhibit "A" [to Bill of Complaint—Agreement,  
Dated July 22, 1910].**

**SEWER CONSTRUCTION.**

**BOND ISSUE, 1904, CONTRACT No. 6-A.  
RESOLUTION OF AWARD, No. 5455. (Second  
Series).**

**THIS AGREEMENT**, made this 22d day of July, A. D. 1910, by and between Metropolis Construction Co. of the City and County of San Francisco, State of California, the party of the first part, and the **BOARD OF PUBLIC WORKS** of the **CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA**, under and by virtue of the authority granted to it as such by Article VI of the Charter of the City and County, approved January 19th, 1899, the party of the second part.

**WHEREAS**, the said party of the first part, as will more fully appear by reference to the record of the proceedings of the Board of Public Works of said City and County, on the 8th day of July, A. D. 1910, has been awarded the contract for the work hereinafter mentioned;

**NOW, THEREFORE, THESE PRESENTS WITNESSETH**, That the said party of the first

part, for and in consideration of the premises aforesaid and the consideration hereinafter mentioned, promises and agrees with the said Board of Public Works, as such and not otherwise, that it will do and perform, in a good and workmanlike manner, under the direction and to the satisfaction of the said Board of Public Works, and will prosecute with diligence from day to day to completion, and will furnish the materials used in the execution and completion thereof, to [27] the satisfaction of the said Board of Works, all the following work in the said City and County of San Francisco, to wit:

The construction of sewers and appurtenances in Kentucky and Fourth Streets.

Said work to be commenced within 15 calendar days and completed within 150 calendar days from the date of contract, as specified in the notice inviting proposals therefor.

Said work shall be done according to the specifications hereunto annexed and made a part of this contract, and the materials used therein shall comply with the said specifications.

And the said Board of Public Works, in behalf of the City and County of San Francisco promises and agrees that upon the performance and fulfillment of the covenants aforesaid the said City and County will pay or cause to be paid, in the manner provided by law, to said party of the first part, for the work aforesaid, the following price, to wit:

(Price of each unit of work is inserted here.)

Progressive payments for said work to be made, as provided for in the specifications therefor.

And it is further understood and agreed by and between parties of the first and second part hereto, that this contract is entered into in compliance with, and subject to, the conditions imposed by Section I, Chapter III, Article II of the Charter of the said City and County of San Francisco, providing that in the performance of this contract eight (8) hours shall be the maximum hours of labor on any calendar day, and that the minimum wages of laborers employed by the contractor in the execution of this contract shall be two (2) dollars a day. [28]

Also, it is agreed and understood by the parties to this agreement, that in no case except where it is otherwise provided in said Charter, will the said City and County, or any department or officer thereof, be liable for any expense of the work aforesaid.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, and have executed this contract in triplicate, the day and year first above written.

[Seal M. C. Co.]

METROPOLIS CONSTRUCTION CO.,  
INC.

By CHRIS EMILLE. [Seal]

Signed, sealed and delivered in the presence of

MICHAEL CASEY, [Seal]

W. A. NEWSOM, [Seal]

P. FREDERICK, [Seal]

Commissioners, Board of Public Works of the City  
and County of San Francisco.

[Seal B. P. W.]

Executed in triplicate. [29]



**Exhibit "B" [Agreement, Dated July 30, 1910].**

**THIS AGREEMENT**, made and entered into this 30th day of July, A. D. 1910, by and between **PAUL I. WELLES**, of the City and County of San Francisco, State of California, hereinafter known as the party of the first part, and the **METROPOLIS CONSTRUCTION COMPANY**, a corporation, organized and existing under and by virtue of the laws of the State of California, hereinafter known as the party of the second part,

**WITNESSETH:** That the said party of the first part, for and in consideration of the covenants and agreements hereinafter set forth and contained, promises and agreed to and with the said party of the second part that the said party of the first part will construct the concrete and pipe sewer from the Channel on Fourth Street in the City and County of San Francisco thence up, in and along Fourth Street to and with the intersection of said Fourth Street to its intersection with Sixteenth Street, together with all man-holes, "Y" branches, piling and all necessary connections, all of said work to be done and performed in a good and workmanlike manner and to the satisfaction of the Board of Public Works of the City and County of San Francisco, State of California, and to furnish all of the materials and labor necessary to carry on and complete the work mentioned in the plans and specifications and contract heretofore entered into between the City and County of San Francisco and the party of the second part, for the construction of sewers and appurten-



ances in Fourth Street and Kentucky Street from Channel Street to Sixteenth Street in said City and County, a copy of which said plans and specifications being hereto attached and made a part of this agreement, the said contract heretofore referred as having been entered into between said second [30] party and said City and County of San Francisco, being dated the — day of —, A. D. 1910.

It is agreed by and between the parties hereto that the party of the first part is to furnish all of the material and labor necessary to do all of the said work, all to be done in strict accordance with the plans and specifications aforesaid which are hereto annexed, made a part of this contract, and marked Exhibit "A."

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that the party of the first part will purchase from the party of the second part and the party of the second part agrees to sell at marked cost, to the party of the first part all materials which may be used by the party of the first part in the doing and the performing of all of the work hereinbefore mentioned and all the materials to be furnished which will actually enter into the aforesaid work.

IT IS FURTHER AGREED between the parties hereto that the party of the second part will pay to Moriarty & Company out of the moneys and payments due or to become due to the party of the first part for the work and labor done and materials furnished under this contract whatever sum of sums of money that may be now due or to become due to the

said firm of Moriarty & Company for the doing of the piling work under their contract with the party of the first part herein.

The party of the second part agrees to pay the party of the first part for all work done and materials furnished, as follows, to-wit:

Ninety (90%) per cent of the sum of \$33,182.00; that is to say, ninety (90%) per cent of any sum lesser or greater than said sum of \$33,182.00 to be received by said second [31] party from the City and County of San Francisco, under its contract, with said City and County aforesaid; it being understood by and between the parties hereto that as the contract of said second party with the said City and County of San Francisco is based on unit prices and quantities and that therefore the sum to be received by said second party from said City and County might vary somewhat from the sum last named. Said ninety per cent (90%) aforesaid to be paid said first party by said second party in the manner following, to-wit: Eighty (80) per cent of the sum received by the second party at the times it receives its payments under its contract with said City and County of San Francisco, the balance of said ninety (90) per cent to be paid said first party, when the second party receives its final payment under its contract with City and County of San Francisco.

It is understood all work to be done under super-

vision of Metropolis Construction Co. or its representative.

Time is and shall be of the essence of this contract.

PAUL I. WELLES. [Seal]  
METROPOLIS CONSTRUCTION COM-  
PANY, INC.

By CHRIS O. MILLER,  
President.

[Corporate Seal]

By A. W. REMICKE,  
Treasurer. [32]

**Exhibit "C" [Stop Notice and Notice of Claim].**

\$8,500.

PAUL I. WELLES,

versus

METROPOLIS CONSTRUCTION CO., a Corpo-  
ration, EMPIRE STATE SURETY CO., a  
Corporation, the CITY AND COUNTY OF  
SAN FRANCISCO, California, a Municipal  
Corporation, the BOARD OF SUPERVIS-  
ORS of said City and County and the BOARD  
OF PUBLIC WORKS thereof.

**STOP NOTICE AND NOTICE OF CLAIM.**

To the City and County of San Francisco, State of  
California, a Municipal Corporation, and to the  
Mayor thereof, and to the Board of Supervisors  
Thereof, and to the Board of Public Works  
Thereof, and to METROPOLIS CONSTRUC-  
TION CO., a Corporation, and to EMPIRE  
STATE SURETY CO., a Corporation.

You and each of you are hereby notified that Paul I. Welles, did, at the times and in the manner hereinafter mentioned, furnish and supply labor, materials and supplies to be used, and which were actually used, in the building and construction of a sewer and appurtenances in Fourth and in Kentucky Streets at and near the intersections of said streets, in the City and County of San Francisco, State of California, which said sewer and appurtenances is partially completed and is now (December 10, 1910) under construction on land belonging to the said City and County of San Francisco, to-wit: in [33] Fourth Street and in Kentucky Street at and near the intersection of said streets, in the said City and County of San Francisco;

AND THAT said City and County of San Francisco, is the OWNER of said streets which are regularly dedicated and accepted streets, and, as such owner, did cause said sewer and appurtenances to be constructed and the said labor and work done and materials furnished, and, in that behalf, did, to-wit: on the eighth (8th) day of July, 1910, by and through the Board of Public Works of the said City and County of San Francisco, duly award to Metropolis Construction Co., a corporation, a contract to do and perform, in the said City and County, the said building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets and did, to-wit: on July 22d, 1910, duly accept the bond of said Metropolis Construction Co., a corporation, as principal, and the Empire State Surety Co., of New York, a corporation, as surety in the sum of

Seventeen Thousand (\$17,000) Dollars, as provided by an "Act to Secure the Payment of the Claims of Materialmen, Mechanics, or Laborers, Employed by Contractors upon State, Municipal, or other Public Works," approved March 27th, 1897, and did, on said July 22d, 1910, duly enter into a written contract with the said Metropolis Construction Co., a corporation, by the terms of which said contract said Metropolis Construction Co., a corporation, did contract, undertake and agree to build and construct the said sewer and appurtenances on Fourth and Kentucky Streets according to plans and specifications annexed to said contract and forming part thereof; [34]

AND THAT, between said July 22, 1910, and August 6, 1910, the said Metropolis Construction Co., a corporation, as contractors aforesaid, and on or about said dates, and under the aforesaid written contract, and, also, as agents of said owner, did enter into an agreement with said Paul I. Welles to furnish labor and materials and to do all the construction work upon said sewer and appurtenances, and to do and perform all the construction work and furnish and supply all materials and labor necessary to fully complete and perform the said contract made and entered into between the City and County of San Francisco, through its Board of Public Works and said Metropolis Construction Co., exception however, that as between said Paul I. Welles and said Metropolis Construction Co., a corporation, it was agreed that said corporation should furnish to said Paul I. Welles all necessary sand, cement, pipe and rock necessary to be used in the performance of said work.



and in the execution of said contract at the actual cost to said Metropolis Construction Co., and should deduct the actual costs thereof from payments agreed to be made by said Metropolis Construction Co. unto said Paul I. Welles in accordance with the terms of the contract entered into between said Welles and said Metropolis Construction Co. An inspection of the original of which contract, is hereby tendered to you and said contract is open to your inspection at any time that you may designate.

That in accordance with said sub-contract so entered into between the Metropolis Construction Co. and said Paul I. Welles the latter commenced on or about the 10th day of August, 1910, and did proceed with the work of the building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets in accordance with the terms of the contract [35] made and entered into by the said City and County of San Francisco, through its Board of Public Works with said Metropolis Construction Co., and said Paul I. Welles has continued to perform said work under and by virtue of his sub-contract with said Metropolis Construction Co. down to and inclusive of the present time and the date of this notice.

That said Paul I. Welles has completed 95% or thereabouts of all work contracted to be performed in the building and construction of said sewers and appurtenances under and by virtue of the terms of said contract entered into between said City and County of San Francisco through its Board of Public Works and said Metropolis Construction Co.



That under and by virtue of the terms of said sub-contract so entered into between said Paul I. Welles and Metropolis Construction Co. there has become and now is due, owing and unpaid unto said Paul I. Welles for work performed and materials furnished under said sub-contract for the building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets the sum of Eighty-five Hundred (\$8500) Dollars, and that no part of said sum has ever been paid to said Welles. That the whole thereof is now due to said Paul I. Welles from said Metropolis Construction Co. under and by virtue of the terms of said sub-contract and for work and labor performed and materials furnished in carrying out the contract entered into between Metropolis Construction Co. and said City and County of San Francisco through its Board of Public Works.

That the work and labor performed and materials furnished by said Paul I. Welles amounting to said sum of Eighty-five Hundred Dollars has all been inspected and accepted by the City Engineer and the same has been approved by the Board of [30] Public Works of the City and County of San Francisco, for the purpose of estimating the payment to be made by the City and County of San Francisco, to the Metropolis Construction Co. as a progress payment for work performed under the terms of the contract between said City and said Metropolis Construction Co. for the month of November, 1910. That said progress payment which has been accepted by said City Engineer and approved by said Board of Public Works, and as said Paul I. Welles is in-

formed and believes and therefore alleges, is about to be paid to the said Metropolis Construction Co. amounts to the sum of \$6,830.85.

WHEREFORE, you, the said City and County of San Francisco, and you the said Mayor thereof, and you, the said Board of Supervisors thereof, and you the said Board of Public Works thereof, and you said Metropolis Construction Co., a corporation, and you, said the Empire State Surety Company, a corporation, are directed and required and hereby GIVEN NOTICE TO RETAIN sufficient moneys out of any moneys due, or that may become due, to said Metropolis Construction Co., a corporation, upon said contract for the construction and building of a sewer and appurtenances in Fourth and Kentucky Streets in said City and County of San Francisco, dated, to-wit: July 22, 1910, to pay said sum of Eighty-five Hundred (\$8500) Dollars to said Paul I. Welles, in full;

And you are hereby put upon inquiry as to the nature and extent of the obligation of said Metropolis Construction Co., a corporation, to said Paul I. Welles, upon and for and on account of the work, labor and materials furnished by him in the said construction work hereinabove alleged to have been by him done and completed in and about said sewer and appurtenances; [37]

And you are further hereby notified that the intent of this notice is to comply with the terms and conditions of section 1184 of the Code of Civil Procedure in such cases made and provided, and, also, with the provisions of said act of the legislature, ap-

proved March 27th, 1897, mentioned on page two hereof, and to hold you and each of you liable to said Paul I. Welles, his heirs, successors and assigns accordingly.

Dated December 10, 1910.

PAUL I. WELLES.

C. A. S. FROST,

Counsel,

1304 Humboldt Bank Building. [38]

**Exhibit "D" [Amended Stop Notice and Notice of Claim].**

\$19,867.80.

PAUL I. WELLES,

versus

**METROPOLIS CONSTRUCTION CO., a Corporation, EMPIRE STATE SURETY CO., a Corporation, the CITY AND COUNTY OF SAN FRANCISCO, California, a Municipal Corporation, the BOARD OF SUPERVISORS of Said City and County, and the BOARD OF PUBLIC WORKS Thereof.**

**AMENDED STOP NOTICE AND NOTICE OF CLAIM OF PAUL I. WELLES.**

To the City and County of San Francisco, State of California, a Municipal Corporation, and to the Mayor thereof, and to the Board of Supervisors Thereof, and to the Board of Public Works Thereof, and to METROPOLIS CONSTRUCTION CO., a Corporation, and to EMPIRE STATE SURETY CO., a Corporation.

You and each of you are hereby notified that Paul

I. Welles did, at the times and in the manner herein-after mentioned, furnish and supply labor, materials and supplies to be used, and which were actually used, in the building and construction of a concrete and pipe sewer and appurtenances, from the Channel on Fourth Street, in the City and County of San Francisco, thence up, in, and along Fourth Street to and with the intersection of said Fourth Street with Kentucky Street, thence in and along said Kentucky Street to its intersection with Sixteenth Street, in the City and County of San Francisco, State of California, which said sewer and appurtenances is [39] partially completed and is now (December 10, 1910) under construction on land belonging to said City and County of San Francisco, to-wit: in Fourth Street and in Kentucky Street at and near the intersection of said streets, in the said City and County of San Francisco, as aforesaid;

AND THAT said City and County of San Francisco, is the OWNER of said Streets which are regularly dedicated and accepted streets, and, as such owner, did cause said sewer and appurtenances to be constructed and the said labor and work done and materials furnished, and, in that behalf, did, to-wit: on the eighth (8th) day of July, 1910, by and through the Board of Public Works of the said City and County of San Francisco, duly award to Metropolis Construction Co., a corporation, a contract to do and perform, in the said City and County, the said building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets and did, to-wit: on July 22d, 1910, duly accept the bond

of said Metropolis Construction Co., a corporation, as principal, and the Empire State Surety Co., of New York, a corporation, as surety, in the sum of Seventeen Thousand (\$17,000) Dollars, as provided by an "Act to Secure the Payment of the Claims of Materialmen, Mechanics, or Laborers, Employed by Contractors upon State, Municipal, or other Public Work," approved March 27th, 1897, and did, on said July 22d, 1910, duly enter into a written contract with the said Metropolis Construction Co., a corporation, by the terms of which said contract said Metropolis Construction Co., a corporation, did contract, undertake and agree to build and construct the said sewer and appurtenances on Fourth and Kentucky Streets according to plans and specifications annexed to said contract and forming part thereof; [40]

AND THAT between said July 22, 1910, and August 6, 1910, the said Metropolis Construction Co., a corporation, as contractors aforesaid, and on or about said dates, and under the aforesaid written contract, and, also, as agents of said owner, did enter into an agreement with said Paul I. Welles wherein and whereby it was agreed that said Paul I. Welles would construct said concrete and pipe sewer and appurtenances, together with all man-holes, "Y" branches, piling and all necessary connections, and wherein and whereby it was agreed that said Paul I. Welles would furnished labor and materials and do all the construction work upon said sewer and appurtenances, and do and perform all the construction work and furnish and supply all materials and labor necessary to fully complete and perform the said contract made



and entered into between the City and County of San Francisco, through its Board of Public Works and said Metropolis Construction Co., excepting however, and as between said Paul I. Welles and said Metropolis Construction Co., a corporation, it was agreed that said corporation should furnish to said Paul I. Welles all necessary sand, cement, pipe and rock necessary to be used in the performance of said work, and in the execution of said contract at the actual cost to said Metropolis Construction Co., and should deduct the actual costs thereof from payments agreed to be made by said Metropolis Construction Co. unto said Paul I. Welles in accordance with the terms of the contract entered into between said Welles and said Metropolis Construction Co., an inspection of the original of which contract is hereby tendered to you and said contract is open to your inspection at any time that you may designate. [41]

And in accordance with said agreement so entered into between the Metropolis Construction Co. and said Paul I. Welles the latter commenced on or about the first day of August, 1910, and did proceed with the work of the building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets and furnished all the labor and materials used therein, in accordance with the terms of the contract made and entered into by the said City and County of San Francisco, through its Board of Public Works with said Metropolis Construction Co., and said Paul I. Welles has continued to perform said work and to furnish all labor and materials used in said sewer construction.



That said Paul I. Welles has completed 95% or thereabouts of all work contracted to be performed, and has furnished and supplied all labor and materials used, and to be used, in the building and construction of said sewer and appurtenances under and by virtue of the terms of said contract entered into between said City and County of San Francisco, through its Board of Public Works and said Metropolis Construction Co.

THAT under and by virtue of the terms of said agreement so entered into between said Paul I. Welles and Metropolis Construction Co. there has become and now is due, owing and unpaid unto said Paul I. Welles for work performed and materials furnished under said agreement for the building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets the sum of Nineteen Thousand Eight Hundred Sixty-seven and Eighty Hundredths (\$19,867.80) Dollars, accruing as follows: [42]

December 1st, 1910.

Amount paid Metropolis Construction Co.

Contractors.....	\$21,456.79
80% due Paul I. Welles under agreement	
of which sum of \$17,165.32 due him..	17,165.32
Said Paul I. Welles has received only....	9,995.88

---

Leaving now due said Paul I. Welles of  
the said \$17,165.32, so paid contract-  
ors.....\$ 7,169.44

Portion of Contract price not yet paid contractors as follows:

Estimated Contract Price.....	\$33,182.00
Less Payments.....	21,456.79
	<hr/>
	\$11,725.21
80% of said \$11,725.21 due Paul I. Welles under said agreement.....	\$ 9,380.16
10% of whole contract price (estimated) to be paid Paul I. Welles under said agreement.....	3,318.20
	<hr/>
	\$19,867.80

That no part of said sum has ever been paid to said Welles. That the whole thereof is now due to said Paul I. Welles from said Metropolis Construction Co. under and by virtue of the terms of said agreement and for work and labor performed and materials furnished in carrying out the contract entered into between Metropolis Construction Co. and said City and County of San Francisco, through its Board of Public Works. [43]

AND YOU AND EACH OF YOU ARE ALSO HEREBY NOTIFIED THAT the amount in value of the labor and materials already done and furnished by said Paul I. Welles in the construction of said sewer and appurtenances is the sum of Twenty-nine Thousand Two Hundred Sixty-one (\$29,261.00) Dollars, and that the amount in value of the labor and materials necessary to complete the said construction of said sewer and appurtenances is the sum of One Thousand (1,000) Dollars; a total of Thirty-

Thousand Two Hundred Sixty-one (\$30,261.00) Dollars, and that he, said Paul I. Welles, has received on account thereof the sum of Nine Thousand Nine Hundred Ninety-five and Ninety-eight Hundredths (\$9,995.98) Dollars and no more, and that there remains now due and owing said Paul I. Welles, based on the said amount in value of said labor and materials so done and furnished, the sum of Twenty Thousand Two Hundred Sixty-five and Two Hundredths (\$20,265.02) Dollars, and the whole thereof;

That the work and labor performed and materials furnished by said Paul I. Welles amounting in value of said sum of Twenty-nine Thousand Two Hundred Sixty-one (\$29,261.00) Dollars, has all *be* inspected and accepted by the City Engineer and the same has been approved by the Board of Public Works of the City and County of San Francisco.

WHEREFORE you, the said City and County of San Francisco, and you, the said Mayor thereof, and you, said Board of Supervisors thereof, and you, the said Board of Public Works thereof, and you, said Metropolis Construction Co., a corporation, and you, said Empire State Surety Company, a corporation, are directed and required and hereby GIVEN NOTICE TO RETAIN sufficient moneys out of any moneys due, or that may become due, [44] to said Metropolis Construction Co., a corporation, upon said contract for the construction and building of a sewer and appurtenances in Fourth and Kentucky Streets, in said City and County of San Francisco, dated, to-wit: July 22, 1910, to pay said sum of Seven Thousand One Hundred Sixty-nine and Forty-four

Hundredths (\$7,169.44) Dollars, and,

ALSO said sum of Nine Thousand Three Hundred Eighty and Sixteen Hundredths (\$9,380.16) Dollars, and,

ALSO said sum of Three Thousand Three Hundred Eighteen and Twenty Hundredths (\$3,318.20) Dollars,

AND in all the said sum of Nineteen Thousand Eight Hundred Sixty-seven and Eighty Hundredths (\$19,867.80) Dollars;

AND ALSO that you, and each of you, severally, and, also, jointly, reserve and pay, irrespective of any rights of said Metropolis Construction Company under its said contract dated, to-wit: July 22d, 1910, to said Paul I. Welles, the above mentioned sum of Twenty Thousand Two Hundred Sixty-five and Two Hundredths (\$20,265.02) Dollars, for and on account of the value in amount of labor and materials done and furnished by him in the construction of said sewer and appurtenances.

And you are hereby put upon inquiry as to the nature and extent of the obligation of said Metropolis Construction Co., a corporation, to said Paul I. Welles, upon and for and on account of the work, labor and materials furnished by him in the said construction work hereinabove alleged to have been by him done and completed in and about said sewer and appurtenances; and

ALSO as to the nature and extent and amount in value of the labor and materials done and furnished by said Paul I. Welles [45] in the construction of said sewer and appurtenances and necessary to

complete the same;

And you are further hereby notified that the intent of this notice is to comply with the terms and conditions of Section 1184 of the Code of Civil Procedure in such cases made and provided, and, also, with the provisions of said Act of the Legislature, approved March 27th, 1897, mentioned on page two (2) hereof, and to hold you and each of you, liable to said Paul I. Welles, his heirs, successors and assigns accordingly.

Dated: December 15th, 1910.

PAUL I. WELLES.

C. A. S. FROST,

Counsel for Paul I. Welles,

1304 Humboldt Bank Building,

San Francisco, California.

Telephone—Kearny 4644.

Filed Apr. 18, 1911. . [46]

---

[Title of Court and Cause.]

**Order to Show Cause.**

On reading the complaint on file herein and upon motion of C. A. S. Frost, Esqr., attorney for complainant, by the Court now here ordered, that John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, defendant, herein, be, and appear before this Court on Wednesday, May 3d, 1911, at 10 o'clock A. M., then and there to show cause if any they have, why the said Thomas F. Boyle



should not be required to allow and approve the demand, to wit: the Fourth Progressive payment for the sum of Six Thousand Eight Hundred Thirty and Eighty-five Hundredths (\$6,830.85) Dollars mentioned in the said bill of complaint, and to deliver the same to said John Daniel, as trustee of the estate of said bankrupt, to abide the result of this action, and also why said Portuguese-American Bank of San Francisco should not be restrained and enjoined from further prosecuting or proceeding with its application for a writ of mandate to said Thomas F. Boyle, now pending in the Superior Court of the State of California, in and for the City and County of San Francisco, and being numbered 33,836 in the records and files of said Superior Court. [47]

---

[Title of Court and Cause.]

**Return of United States Marshal on Order to Show Cause.**

United States Marshal's Office,  
Northern District of California.

I hereby certify that on the 19th day of April, 1911, I received from the attorney for the plaintiff in the above-entitled action, three certified copies of an Original Minute Order to Show Cause on file in the Clerk's Office of the United States District Court in and for the Northern District of California, and made by John J. De Haven, Judge of the said United States District Court. Said certified copies having been certified to by the Clerk of the United States District Court in and for said District, and I did

on the 19th day of April, 1911, serve one of said certified copies of Order to Show Cause upon the PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a corporation, by handing to and leaving [48] one of said certified copies of said order with V. L. FIGUEIREDO personally, who is the Cashier of the said Portuguese-American Bank of San Francisco, a corporation, in the City and County of San Francisco, in said District.

I further certify that I served one of said certified copies of said Order to Show Cause upon THOMAS F. BOYLE on the 19th day of April, 1911, by handing to and leaving one of said certified copies of said order with John J. Boyle personally, who is the brother and Chief Deputy in the office of said Thomas F. Boyle, in the City and County of San Francisco, in said District. Said Thomas F. Boyle having informed me over the telephone that he was personally just leaving the City of San Francisco, and that he would accept service of said writ by my serving the same upon John J. Boyle, his Chief Deputy.

I further certify that I served one of said certified copies of Order to Show Cause upon JOHN DANIEL, Trustee of the Estate of Metropolis Construction Company, a corporation, on the 25th day of April, 1911, by handing to and leaving one of said certified copies of said order with said John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, personally, in the City and

County of San Francisco, State and Northern District of California.

C. T. ELLIOTT,  
United States Marshal.  
By B. F. Towle,  
Office Deputy Marshal.

Filed May 1, 1911. [49]

---

[Title of Court and Cause.]

**Amendments to Bill of Complaint.**

Now comes the complainant and, by leave of the Court in that behalf first had and obtained, makes and files the following amendments to his bill of complaint on file herein:

**AMENDMENT ONE.**

On page three, line twenty-two (at the beginning of paragraph seven) of said bill, strike out the word "September" and insert in lieu thereof the word "December."

**AMENDMENT TWO.**

On page five, line eleven (near the end of said paragraph seven) of said bill, strike out the words "and its proceeds" and insert in lieu thereof the word "for."

**AMENDMENT THREE.**

On page five, line eighteen (near the end of said paragraph seven) of said bill, strike out the word "fund" and insert in lieu thereof the word "demand." [50]

**AMENDMENT FOUR.**

On page six, line twenty-one (in the first line of

paragraph nine) of said bill, strike out the word "assets" and insert in lieu thereof the word "asserts."

**AMENDMENT FIVE.**

On page six, line twenty-eight (in the second line of paragraph ten) of said bill, strike out the word "moneys" and insert in lieu thereof the word "demand."

**AMENDMENT SIX.**

On page seven, line one (near the end of said paragraph ten) of said bill, strike out the word "moneys" and insert in lieu thereof the word "demand."

**AMENDMENT SEVEN.**

On page seven, line nineteen (in the second paragraph of the provisions quoted from certain specifications therein mentioned) of said bill, strike out the figures "\$15,000.00" and insert in lieu thereof the figures "\$5,000.00."

**AMENDMENT EIGHT.**

On page thirteen, line twenty (in the second line of the prayer) after the word "said" insert the words "demand for."

**AMENDMENT NINE.**

On page thirteen, line twenty-eight, of said bill, strike out the word "moneys" and insert in lieu thereof the word "demand."

Dated: May 24th, 1911.

C. A. S. FROST,

Solicitor for Complainant. [51]

Receipt of a copy of within "Amendments to Bill

of Complaint" this 24th day of May, 1911, is acknowledged.

M. J. GREEN,

Solicitor for John Daniel, Trustee, Defendant.

JAS. B. FEEHAN,

Solicitor for Portuguese-American Bank of San Francisco, a Corporation, Defendant.

Filed May 24, 1911. [52]

---

[Title of Court and Cause.]

**Return of the Portuguese-American Bank of San Francisco.**

The respondent, the Portuguese-American Bank of San Francisco, hereby reserves unto itself the preliminary objection heretofore urged to the jurisdiction of this Court to make or enter the order prayed by the petitioner herein upon the divers grounds set forth in its motion to dismiss said complaint in this matter, and said respondent, the Portuguese-American Bank of San Francisco, does not waive said question of jurisdiction by making this return, but especially challenges the jurisdiction of this Court to make or enter said order prayed for, and without waiving said point of jurisdiction, the said respondent, for the information of this Honorable Court, hereby makes return to the Order to Show Cause herein and sets forth the following specific facts relating to its title to the warrant and demand referred to in said complainant's complaint, that is to say: [53]

On December 6th, 1910, at San Francisco, Califor-



nia, the said corporation, Metropolis Construction Company, did borrow from this respondent, the Portuguese-American Bank of San Francisco, the sum of Thirty Thousand Dollars (\$30,000.00) in gold coin of the United States, and on December 7th, 1910, an additional sum of Five Thousand Dollars (\$5,000.00); that the said Metropolis Construction Company, on said December 6th, 1910, and at the time of obtaining said loan, to secure the payment of said borrowed moneys, assigned to this banking corporation its right, title and interest to three warrants for so many progressive payments in the sum of Thirty-eight Thousand Dollars (\$38,000.00), or thereabouts, upon the City and County of San Francisco, and from said municipal corporation then due and payable, on account of sewer work done and performed by said Metropolis Construction Company under a contract between said Company and the City and County of San Francisco; that written notice of said assignment by said company to this banking corporation, at the time of said assignments to it, was given to and received by the Auditor of said City and County, the official authorized and empowered by law to audit and approve said warrants.

That this banking corporation, for said consideration of said money loaned by it to said Metropolis Construction Company, was and is the holder of said assignment in good faith and for a present fair consideration and the *bona fide* holder thereof, and at the time of said transaction and transfer then did not have any reason to believe, and there was no reason, that the enforcement of such assignment

would effect a preference, and such assignment was not a preference in truth or in fact and is not charged or alleged by said trustee, or any party to this or any other proceeding or suit in this Court, or elsewhere, to be in fact a preference. [54]

That said assignment by said Metropolis Construction Company to this banking corporation was made on December 6th, 1910; that said warrants, one of which is the same warrant in controversy and mentioned in said Complaint of said Paul I. Welles, were duly approved by the Board of Supervisors and the Mayor of said City and County on January 5th, 1911, and presented to said Auditor of said City and County to audit and allow the same;

That in order to enforce its demand to possession of said warrants, this banking corporation, as stated in said complaint, has filed in the Superior Court of the State of California, in and for the City and County of San Francisco, and there is now pending in said Superior Court the verified petition of this banking corporation praying for the judgment and decree of said court that a Writ of Mandate issue to said Auditor requiring and commanding him to audit and approve said warrants and surrender the same to this respondent, the Portuguese-American Bank of San Francisco as the sole party legally entitled thereto and the legal holder thereof. That said petition is pending and undetermined, and further proceedings therein have been restrained by the preliminary restraining order issued by the Referee in Bankruptcy in said matter.

That this respondent, the Portuguese-American

Bank of San Francisco, claims and is the legal owner of said warrant and the proceeds thereof, the sole party entitled to have, demand, collect and receive all and singular the moneys represented by said warrant here in controversy, claims and is the owner of the moneys and assets evidenced by said warrant of said City and County by it held as aforesaid by virtue of the assignment to it as herein mentioned adversely against all the world, and asserts its legal right to enforce its said demand against said Auditor to approve [55] said warrants and surrender the same to this banking corporation in its said mandamus proceeding in said State Court and challenges the right of said complainant in this Court, and the power of this Honorable Court to interfere with or arrest its said mandamus proceeding in any manner or form in this forum.

This respondent further states and advises the Court that in said mandamus proceeding in said State Court the title of all adverse claims to said warrants can be fully and speedily heard and determined and said complainant can resist the adverse claims of this banking corporation in said proceeding.

Respondent, the Portuguese-American Bank of San Francisco, further alleges and advises this Honorable Court that said assignment of said warrants was made as aforesaid to this banking corporation on December 6th, 1910, as hereinbefore stated; that the petition to adjudicate said corporation a bankrupt was filed in this Court on December 19th, 1910, and the said adjudication in bankruptcy made on January 5th, 1911.

This respondent further alleges that the said Auditor of said City and County absolutely refuses to audit, surrender, or audit or surrender said warrant, and bases his refusal to do so upon the ground that there are adverse claimants to said warrant and the moneys represented thereby, to wit, this banking corporation, said Paul I. Welles and the said trustee in bankruptcy herein.

WHEREFORE, having fully set forth the truth and fact relating to said transaction, this respondent prays that said Order to Show Cause be discharged, the said complaint dismissed, and for such other and further order in the premises as may be meet and proper.

JAMES B. FEEHAN,  
Attorney for Respondent.

EDWARD LANDE,

Of Counsel. [56]

[Duly verified June 19, 1911.]

Filed Jun. 20, 1911. [57]

---

[Title of Court and Cause.]

**Amended Return of the Portuguese-American Bank  
of San Francisco.**

Defendant, the Portuguese-American Bank of San Francisco, by leave of court first had, to more fully and completely present its rights herein, hereby makes its Amended Return to the Order made by this Honorable Court on the Bill of Complaint of the complainant herein, requiring this defendant to show cause why Thomas F. Boyle, the Auditor of this City

and County of San Francisco, should not be required to allow and approve the demand therein described, and deliver the same to the Trustee in Bankruptcy, and why this defendant should not be restrained from prosecuting its suit in mandamus against the Auditor of the City and County of San Francisco, now pending in the Superior Court of said City and County, to compel said Auditor to approve and deliver to defendant certain demands mentioned in said petition.

1. This defendant expressly refuses to consent to the jurisdiction of this Court to render any judgment or decree or to [58] make any order in this proceeding affecting the rights of this defendant, and hereby reserves unto itself the objections heretofore urged to the jurisdiction of this Court to make or enter the order prayed by the complainant herein upon the grounds set forth in its motion to dismiss said Bill of Complaint, and makes this Return solely under compulsion of said Order to Show Cause.

2. That the Metropolis Construction Company, the bankrupt, prior to December 5th, 1910, was engaged in constructing certain sewers in San Francisco under contracts with the City and County of San Francisco. That said contracts provided for monthly progress payments, the amount of work done and the progress payments due thereon to be ascertained by the City Engineer and the work done to be approved by the Board of Public Works. During the month of November, 1910, certain work was done under said contracts by said Construction Company, and it was measured by the City Engineer and ap-



proved by the Board of Public Works, and progress payments therefor aggregating about Thirty-eight Thousand Dollars (\$38,000.00) ordered paid by the Board of Public Works of the City and County of San Francisco on the 5th day of December, 1910. That three separate demands upon the Treasury of the City and County of San Francisco for these payments were drawn and were approved by said Board of Public Works, by the City Engineer and by the Finance Committee of the Board of Supervisors of said City and County. That in the ordinary course of procedure these demands would be finally paid by the Treasurer about December 12th, 1910. *These demands include the demand described in the Bill of Complaint of the Complainant herein.*

That said warrants or demands were approved as aforesaid by said Board of Public Works, the said City Engineer and the said Finance Committee, on said December 5th, 1910, and at said date the [59] moneys represented by said demands became due to said Metropolis Construction Company.

3. That thereafter, and on December 6th, 1910, said Metropolis Construction Company applied to the Portuguese-American Bank of San Francisco for a loan of Thirty Thousand Dollars (\$30,000.00), offering, as security therefor, to assign to the said bank the said demands upon the Treasury of said City and County and the proceeds thereof and the moneys represented thereby; that on said December 6th, 1910, pursuant to said application, the said bank loaned to said Metropolis Construction Company the sum of Thirty Thousand Dollars (\$30,000.00), gold coin of

the United States, and at the same time and as part of the same transaction, and for and in consideration of said loan, the said Metropolis Construction Company assigned, transferred and set over absolutely to said bank the said demands and the moneys represented thereby; that said bank thereupon and thereby became and ever since has been, and now is the owner of said demands and the moneys represented thereby and entitled to the exclusive possession thereof; that thereafter, and on the 7th day of December, 1910, said bank, at the request of the said Metropolis Construction Company, and on the strength and security of said assignment, advanced and loaned to said Metropolis Construction Company the further sum of Five Thousand Dollars (\$5,000.00), gold coin of the United States, making in all advances or loans of Thirty-five Thousand Dollars (\$35,000.00). That said loans draw interest at the rate of seven per cent (7%) per annum. That no part of said loans or either of them has been repaid.

That said assignment was made to said Portuguese-American Bank of San Francisco by said Metropolis Construction Company, prior to the filing of the petition in bankruptcy herein and prior to the commencement of any proceedings in any court against said Construction [60] Company affecting its credit or solvency and while said Construction Company was a solvent, going concern, engaged in business on a large scale in said City and County and the holder of valuable contracts with said City and County.

That said money was loaned by the said bank and

said assignment accepted in good faith, in the ordinary course of business and without notice to or knowledge on the part of the said bank, or any of its officers, at any time, that said Metropolis Construction Company was insolvent, or in any way involved, or that its credit was impaired, or that insolvency or receivership proceedings were contemplated by or against it; that at the time of said assignment this bank did not, nor did any of its officials, have any reason to believe, and there was no reason, that the enforcement of said assignment would effect a preference, and such assignment is not a preference in truth or in fact; but, on the contrary, said bank, at the time said assignment was made, and at all times prior thereto, considered said Metropolis Construction Company financially sound and successful and amply able to meet all its obligations; that at all said times said Metropolis Construction Company enjoyed a large credit.

4. That this defendant, at all times subsequent to said assignment, to wit: December 6th, 1910, and prior to the filing of the petition in bankruptcy herein, claimed and was, and it now claims to be and is the owner and holder of the legal title of said warrants, and the proceeds thereof and the moneys represented thereby and the sole party entitled to have, demand, collect and receive, all and singular the moneys represented by said warrants herein in controversy.

5. *That none of said demands upon the Treasury was ever in the possession of said bankrupt, either by itself, its agent or [61] agents, or any person*

representing it, at any time subsequent to the said assignment to this bank. *That said demands were never in the possession of the Trustee in Bankruptcy, or under the control of the Bankruptcy Court*, but, on the contrary, said warrants were always, subsequent to December 5th, 1910, and are now in the possession of the officials of the City and County of San Francisco. That none of the moneys represented by said demands has ever been withdrawn from the Treasury of the City and County of San Francisco.

6. That this defendant, in order to enforce its demand to possession of said warrants, as stated in said Bill of Complaint, on January 26th, 1911, and *before the appointment of the Trustee* herein, filed in the Superior Court of the State of California, in and for the City and County of San Francisco, and there is now pending in said Superior Court the verified petition of this banking corporation praying for the judgment and decree of said court that a Writ of Mandate issue to said Auditor requiring and commanding him to audit and approve said warrants, including the demand herein sued for, and surrender the same to this defendant, as the sole party legally entitled thereto and the legal holder thereof. That said petition is pending and undetermined, and further proceedings therein have been restrained by the preliminary restraining order issued by the *Referee in Bankruptcy* in said matter.

That none of the parties to said mandamus proceedings are parties to the proceeding in bankruptcy.

That defendant is informed and believes, and therefore alleges that said Superior Court, in said man-

damus proceeding, has full jurisdiction to determine the rights and claims of the said complainant and the trustee, and all persons whatever to the possession of said warrants and the moneys represented thereby. [62]

This respondent further alleges that said Auditor of said City and County absolutely refuses to audit, surrender, or audit or surrender said warrants, and bases his refusal upon the ground that there are adverse claimants to said warrants and the moneys represented thereby.

7. That said Auditor must determine who is legally entitled to the possession of said demand and is responsible personally and on his bond for the delivery thereof to the property party; that this defendant claims to be the owner and entitled to the possession thereof; that title and right of possession can be determined only by a judgment on the merits and not at this stage of the proceeding; that said Auditor and this defendant object, and each objects, that this Honorable Court is without jurisdiction to enter into a trial on the merits, and neither consents to being made a party defendant herein. That this Honorable Court on the facts set forth in this Amended Return should not make any order at this time which might prejudice the legal rights of said Auditor or this defendant by changing the status and actual possession of the property in controversy.

That the mandamus suit now pending in the Superior Court, and which it is herein sought to be restrained, is brought to enforce the approval, audit and delivery of *two other demands* besides the one in



controversy, and for this reason, as well as others, this Court should not enjoin the prosecution of said suit.

That an assignment for security transfers the legal title.

Gilman vs. Curtis, 66 Cal. 116.

That the Superior Court can try title in mandamus,  
see

Bannerman vs. Boyle, decided by California Supreme Court in bank June 8th, 1911, and reported in The Recorder on June 10, 1911, also reported in Cal. Decisions issue of June 16, 1911, Vol. 41, page 703.

McKannay vs. Horton, 151 Cal. 711. [63]

WHEREFORE, this defendant prays that this Honorable Court make no order in this summary proceeding requiring said Auditor to audit, allow or approve said demands, or deliver the same to the bankrupt, or said trustee, or restraining this defendant from prosecuting said action in said Superior Court; that said Order to Show Cause be discharged, and for such other and further orders as may be meet and proper in the premises.

JAMES B. FEEHAN,  
Attorney for Respondent.

EDWARD LANDE,  
Of Counsel. [64]

[Duly verified June 27, 1911.]

Filed Jun. 27, 1911. [65]

[Title of Court and Cause.]

**Exceptions to Amended Return of Portuguese-American Bank of San Francisco.**

The complainant objects and excepts to the amended return of the Portuguese-American Bank of San Francisco, alleged to be its amended return to the order to show cause herein, and avers that said amended return is insufficient in the following particulars, to wit:

I.

That said amended return is insufficient in that it does not appear and cannot be ascertained therefrom how or in what manner it is claimed that said Metropolis Construction Company assigned or transferred or set over said demand or warrant in controversy, or moneys represented thereby, to said banking corporation.

II.

Said amended return is insufficient in that it does [66] not appear and cannot be ascertained therefrom how or in what manner, it is claimed said bank is the legal owner of said warrant, or the proceeds thereof, or whether or not said bank is the owner of said warrant, or proceeds, at all.

III.

That said amended return is insufficient in that it does not appear and cannot be ascertained therefrom whether it is claimed said alleged assignment or transfer was verbal or in writing or in what said alleged assignment consists.

IV.

That said amended return is insufficient in that it does not appear and cannot be ascertained therefrom what basis, if any, exists for the alleged claim of said Portuguese-American Bank of San Francisco to be the owner of said warrant or to have an assignment thereof.

V.

That said amended return is insufficient in that it does not appear and cannot be ascertained therefrom how or in what manner said bank claims adversely, in that the alleged facts constituting said claim are not disclosed.

VI.

That said amended return is insufficient in that it does not show any *facts* which, if true, constitute a reasonable ground of controversy as to the legal title to said demand; the statement of said bank that it has an "assignment" of, or is the "owner" of said demand, being merely a conclusion of law, unsupported by any *alleged* facts.

C. A. S. FROST,

Solicitor for Complainant.

June 30, 1911. [67]

Receipt of a copy of within *Exceptions* this 3d day of July, 1911, is admitted.

JAS. B. FEEHAN,

Attorney for Defendant Portuguese-American Bank  
of San Francisco.

Filed Jul. 3, 1911. [68]

[Title of Court and Cause.]

**Amended Return to Order to Show Cause, and  
Answer of Thomas F. Boyle, Defendant.**

Now comes Thomas F. Boyle, as one of the defendants in the above-entitled action, and by leave of Court first had and obtained, makes and files the following amended return to the order to show cause, issued herein, and makes and files the following also as his answer to the bill of complaint herein:

**I.**

Admits each and every allegation set forth in paragraphs I, II, III, IV, V, VI, XI, XIa, XV, XVI, XVII, and XX, of said bill of complaint.

**II.**

Admits each and every allegation set forth in paragraph VII of said bill of complaint, except the allegations set forth on lines 20, 21, and 22, page 4 of said bill, in said paragraph VII, and the allegations set forth on lines 17, 18 and 19, page 5 of said bill, in said paragraph VII, and each and every of said allegations are denied. [69]

**III.**

Denies that allegation set forth in paragraph IX of said complaint, that only the complainant, defendant trustee, and the defendant Portuguese-American Bank assert claims to said demand, and in this regard alleges that certain claims, rights, offsets, or counterclaims are made to the demands of money therein referred to, by Empire State Surety Company, a corporation, Central Trust Company, of California, and Pacific Coast Casualty Com-

pany, who have filed notices of such claims in the office of this defendant as Auditor of the City and County of San Francisco, true copies of which notices are attached hereto and made a part hereof, and are marked respectively Exhibit "A," Exhibit "B," Exhibit "C." The notices of claim of said Portuguese-American Bank are attached hereto and made a part hereof, and marked Exhibits "E" and "F."

IV.

That defendant has no knowledge, information or belief sufficient to enable him to answer any or either of the allegations contained in paragraphs XII, XIV and XVIII of said bill of complaint, and therefore he denies each and every of said allegations.

V.

Admits that the work of construction of said sewers and appurtenances at Fourth and Kentucky streets, in said City and County of San Francisco, has been approved and accepted by said City and County.

VI.

Admits that on or about the 13th day of April, 1911, acting under authority of a document filed in his office, a true copy of which, marked Exhibit "D," is attached hereto, and made a part hereof, defendant approved and delivered to John Daniel, Trustee in [70] Bankruptcy a warrant or demand in the sum of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars, in favor of the Metropolis Construction Company, being for the final payment on the Fourth and



Kentucky streets sewer contract, but alleges that this defendant has no knowledge, information or belief sufficient to enable him to answer any or either of the allegations contained in paragraphs VIII and XIX of said bill of complaint as to the disposition made by said Trustee of said warrant or demand, and the payment by said Trustee of any moneys obtained by him by virtue of said warrant, and therefore he denies each and every of said allegations.

#### VII.

Admits each and every allegation contained in paragraph XXI of said bill of complaint except the allegation set forth on lines 15 and 16, page 13 of said bill, which allegation is denied and in that regard, it is alleged that said State Court has jurisdiction to hear and determine conflicting claims to said funds.

#### VIII.

Defendant alleges that he has not, nor has he had at any time, in his possession or under his control, any moneys claimed by any of the parties to this action, but admits that he has in his possession, awaiting his official approval as Auditor of said City and County of San Francisco, a warrant or demand in the sum of Six Thousand Eight Hundred Thirty and Eighty-five Hundredths (\$6,830.85) Dollars, payable to the Metropolis Construction Company, as the fourth progress payment on the contract for the construction of the Fourth and Kentucky street sewer, and that he has not approved said warrant or demand, because of the conflicting claims to the [71] right of possession of said warrant, as is more

fully set forth herein, and in the bill of complaint, and that the City and County of San Francisco makes no claim to said warrant, or demand, or any of the proceeds thereof, nor does this defendant make any such claims, and this defendant is merely a stake holder.

IX.

Defendant further alleges that the alternative writ of mandate and order to show cause why he should not deliver possession of the demand to the Portuguese-American Bank of San Francisco, issued by the Superior Court of the State of California, in and for the City and County of San Francisco, as is more fully set forth in paragraph XXI of the bill of complaint, is yet in full *and* force and effect, and that defendant is now subject to said order of said Superior Court, and is awaiting adjudication by said court of the conflicting claims to the right of possession of said demand, so that he may know to whom said demand shall be delivered by him.

WHEREFORE, defendant prays that he may be hence dismissed.

THOS. F. BOYLE,  
Defendant.

EDWARD F. MORAN,  
Attorney for Defendant Thomas F. Boyle. [72]  
[Duly verified June 30, 1911.] [73]

**Exhibit "A" [to Amended Return and Answer of  
Thomas F. Boyle—Notice Dated December 15,  
1910].**

San Francisco, Calif., Dec. 15, 1910.

NOTICE to the

**BOARD OF PUBLIC WORKS, City and County  
of San Francisco, State of California,  
BOARD OF SUPERVISORS, City and County of  
San Francisco, State of California,  
CITY AND COUNTY OF SAN FRANCISCO,  
STATE OF CALIFORNIA, a Municipal Cor-  
poration,  
METROPOLIS CONSTRUCTION COMPANY, a  
Corporation,  
PAUL I. WELLES.**

You and each of you will please hereby take notice that on the 21st day of July, 1910, in the City and County of San Francisco, State of California, the **METROPOLIS CONSTRUCTION COMPANY**, a corporation, did, by and through its officers thereunto duly authorized, make application to the undersigned **THE EMPIRE STATE SURETY COMPANY**, for contractors bonds in the sum of Seven Thousand and 00/100 (\$7000.00) Dollars, and Seventeen Thousand and 00/100 (\$17,000.00) Dollars, respectively conditioned for the performance of the contract for the construction of Sewer System along and upon Fourth and Kentucky Streets, City and County of San Francisco, State of California.

You are further notified that subsequent to the making of such application said bonds were in due

form regularly and legally issued and delivered, and that the said METROPOLIS CONSTRUCTION COMPANY, thereafter commenced and has since prosecuted the work under said contract.

That the performance of the work has now ceased and that under and by virtue of the agreement between the Metropolis Construction [74] Company, a corporation as aforesaid, and THE EMPIRE STATE SURETY COMPANY it is provided that in the event of the METROPOLIS CONSTRUCTION COMPANY defaulting in the performance of the said contract, the said THE EMPIRE STATE SURETY COMPANY, shall have the right to collect and reserve all reserve percentages and all moneys due and to become due said Principals under said contract, and to hold and apply the same as collateral to the obligations of said METROPOLIS CONSTRUCTION COMPANY, said agreement being dated July 21st, 1910.

You are therefore hereby notified that all moneys in your hands must be held under the terms of said agreement for the use and purposes therein provided and that you will not pay out the same or any part thereof, excepting in accordance with the terms of said agreement.

Dated this 15th day of December, 1910, at San Francisco, California.

[Seal] THE EMPIRE STATE SURETY COMPANY,

By JAS. C. HAYBURN,  
Attorney in Fact and General Agent. [75]

**Exhibit "B" [to Amended Return and Answer of  
Thomas F. Boyle—Letter Dated December 13,  
1910—Gavin McNab to Thomas F. Boyle].**

**COPY.**

December 13th, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County of San Francisco,

City Hall,

McAllister St., City.

Dear Sir:—

You are hereby notified that Central Trust Company of California, a corporation having its offices at the corner of Sansome and Market Streets, San Francisco, claim to have, and has a valid claim and demand against and interest in any moneys which are now due and payable, or which may become due and payable to Metropolis Construction Company, for services rendered and materials furnished to the City and County of San Francisco (or any department thereof), and you are hereby requested to disallow and disapprove any claim or demand against the City and County of San Francisco or any department thereof, presented to you to be audited by Metropolis Construction Company or any assignee of Metropolis Construction Company, unless the Central Trust Company hereafter consents to such approval of such claim or demand.

The Metropolis Construction Company, a corporation, is now indebted to the Central Trust Company of California, in the sum of \$60,000.00, which sum is evidenced by the promissory notes of Metropolis Construction Company, for moneys loaned and advanced by Central Trust Company of California to Metro-



polis Construction Company, to enable it to purchase materials, and to perform labor in carrying out its contracts with the City and County of San Francisco, and that by reason of the furnishing and advancing said moneys to Metropolis Construction Company said Central Trust Company of California has a valid claim and demand and interest in [76] any moneys now payable to Metropolis Construction Company.

Yours truly,

GAVIN McNAB,

Attorney for Central Trust Company. [77]

**Exhibit "C" [to Amended Return and Answer of Thomas F. Boyle—Notice Dated February 3, 1911].**

**COPY.**

**THE MARSHALL A. FRANK COMPANY.**

San Francisco, Cal., February 3, 1911.

To the City and County of San Francisco, the Honorable Board of Supervisors of Said City and County, the Board of Public Works, and to Honorable Thomas F. Boyle, Auditor:

Dear Sirs:—

You and each of you are hereby notified that the **PACIFIC COAST CASUALTY COMPANY**, a corporation, heretofore gave a bond conditioned on the faithful performance by the **METROPOLIS CONSTRUCTION COMPANY**, of that certain contract known as contract number 36, for the construction of sewers and appurtenances in the Lower Sunset District in the City and County of San Francisco.

Pursuant to notice from the Board of Public Works of the City and County of San Francisco, and

under authority of the United States District Court, for the Northern District of California, sitting in bankruptcy, the **PACIFIC COAST CASUALTY COMPANY** has undertaken to complete the said contract.

You are hereby further notified not to pay to anyone on behalf of the **METROPOLIS CONSTRUCTION COMPANY**, or to anyone other than the undersigned, any moneys due or earned, or that may become due under said contract.

You are particularly notified not to make any payment to the Portuguese American Bank of San Francisco under notice by it of purported assignment to said Bank of alleged rights to certain of said moneys, or to the United Railroads under notice of purported [78] assignment to it of alleged rights of certain of said monies, and are notified not to make, execute, audit or deliver, warrant or demand to any person or corporation whatsoever, other than to the undersigned.

**THE UNDERSIGNED, PACIFIC COAST CASUALTY COMPANY**, hereby claims as surety as aforesaid, that it is entitled to have all of said monies applied to the completion of said work, and for any diversion of said monies, or any thereof, or any appropriation of said monies to the use or benefit of another, the said **PACIFIC COAST CASUALTY COMPANY** will be obliged to hold you respectfully responsible.

Very respectfully,

(Signed) **PACIFIC COAST CASUALTY CO.**

**MARSHALL A. FRANK,**

Attorney-in-fact. [79]

**Exhibit "D" [to Amended Return and Answer of  
Thomas F. Boyle—Letter Dated March 15, 1911,  
to T. F. Boyle].**

March 15, 1911.

Thomas F. Boyle, Esq.,

Auditor of City and County of San Francisco,  
San Francisco, Cal.

Dear Sir:

You are authorized to deliver the warrant for the final payment (\$11,149.64) on the contract to the Metropolis Construction Co., a corporation, with the City and County of San Francisco, for the construction of sewers and appurtenances at Fourth and Kentucky Streets in said City and County to John Daniel, Trustee in bankruptcy, it being understood that said Trustee will take the same subject to notice to withhold for the amounts, and filed on the dates, respectively, set opposite our names below:

Name.	Amount.	Date.
Moriarity & Perkins, by C. A. S.		
Frost, Counsel.	\$820.26	December 12, 1910.
Santa Cruz Portland Cement Co., by L. F. Young Leahy.	2519.00	Feb. 18, 1911.
Paul I. Welles.	19867.80	Dec. 16, 1911.
Bay Development Co.	493.95	Jan. 4, 1911.
Vallejo Brick & Tile Co., Con., by C. Hidecker, Gen. Manager.	609.51	Feb. 21, 1911.
San Francisco Gas & Electric Co., by J. M. Shields, OK. L.		
H. S.	226.75	Feb. 4, 1911.
Loop Lumber Co., by R. T. Hardy.	121.96	Feb. 4, 1911.
Mutual Teaming Co.	676.00	Dec. 20, 1911.

**Exhibit "E" [to Amended Return and Answer of Thomas F. Boyle—Notice Dated December 17, 1910].**

**COPY.**

**PORTUGUESE-AMERICAN BANK.**

San Francisco, December 17, 1910.

To the Auditor and to the Board of Public Works  
and to the Board of Supervisors of the City and  
County of San Francisco.

Gentlemen:—

You are hereby notified that the Metropolis Construction Company has assigned, for value, to the Portuguese-American Bank of San Francisco the warrants in its favor against the City and County of San Francisco, for the amounts of money hereinafter set forth, being progressive payments on account of the contracts hereinafter set forth, to-wit:

1st:—Warrant for the sum of \$6,830.85 being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth Street sewers, the contract being between the Metropolis Construction Co. and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$12,173.17 being fourth progressive payment on account of contract between the Metropolis Construction Co. and said City and County and dated March 25th, 1910, for Lower Sunset District Sewer and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20 being fourth progressive payment on account of contract between the Metropolis Construction Co. and said

City and County and dated June 22nd, 1910, and being for construction of sewer in 7th [81] Street, Howard to Hubbell Streets under contract No. 31.

Said assignment was made on the 5th day of December, 1910, and subsequent to the resolutions to the Board of Public Works authorizing said fourth progressive payments.

Yours very truly.

(Signed) PORTUGUESE-AMERICAN BANK  
OF S. F.

By JAS. B. FEEHAN,  
Atty. [82]

**Exhibit "F" [to Amended Return and Answer of  
Thomas F. Boyle—Notice Dated December 5,  
1910].**

**COPY.**

San Francisco, Cal., December 5, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County of  
San Francisco.

Dear Sir:—

You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco, is hereby authorized and empowered to draw the warrants in favor of the undersigned against City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to-wit:

1st:—Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth



Street sewers, the contract being between the undersigned and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$12,173.17, being fourth progressive payment on account of contract between the undersigned and said City and County and dated March 25th, 1910 for Lower Sunset District Sewer, and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20 being fourth progressive payment on account of contract between the undersigned and said City and County and dated June 22nd, 1910, and being for construction of sewer in 7th street, Howard to Hubbell Streets under contract No. 31.

(Signed)      **METROPOLIS CONSTRUCTION  
COMPANY, INC.,**

By \_\_\_\_\_,  
President. [83]

Due service and receipt of a copy of the within return to the order to show cause and answer is hereby admitted this 30th day of June, 1911.

**O. A. S. FROST,**  
Attorney for Complainant.

Filed Jul. 3, 1911. [84]

---

**[Replication to Answer of Thomas F. Boyle.]**

**[Title of Court and Cause.]**

**REPLICATION OF PAUL I. WELLES, COM-  
PLAINANT, TO THE ANSWER OF  
THOMAS F. BOYLE, DEFENDANT.**

This replicant, Paul I. Welles, saving and reserving to himself all and all manner of advantages of

exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Thomas F. Boyle, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed. [85]

July 8th, 1911.

C. A. S. FROST,

Solicitor for Complainant.

Receipt of a copy of within Replication this 8th day of July, 1911, is admitted.

E. F. MORAN,

Attorney for Defendant Thos. F. Boyle.

Filed Jul. 10, 1911. [86]

**[Order Referring Case to Referee to Hear Testimony and Find Facts, etc., and Restraining Portuguese-American Bank from Prosecuting Mandamus Proceedings.]**

**[Title of Court and Cause.]**

ORDERED that this case be referred to A. B. Kreft, Referee, to hear the testimony and find the facts upon all the issues made by the pleadings, and report the same to this Court, and that in the meantime, and until the further order of this Court the defendant Portuguese-American Bank of San Francisco, be restrained from prosecuting the mandamus proceeding mentioned and referred to in the bill of complaint filed herein.

Dated: July 11th, 1911.

JOHN J. DE HAVEN,  
Judge.

Filed Jul. 11, 1911. [87]

---

**[Order Restraining Portuguese-American Bank from Prosecuting Mandamus Proceedings.]**

**[Title of Court and Cause.]**

This case having been heretofore submitted to the Court on an order to show cause and returns thereto, now after due consideration had thereon, the Court made and filed its order referring the case to A. B. Kreft, Referee in Bankruptcy, to hear the testimony and find facts on all issues made by the pleadings and report, and in the meantime and until the further order of the Court the defendant Portuguese-Ameri-

can Bank of San Francisco is restrained from prosecuting the mandamus proceedings mentioned and referred to in the bill of complaint filed herein. [88]

---

**[Answer of John Daniel, Trustee, etc.]**

**[Title of Court and Cause.]**

**ANSWER OF JOHN DANIEL, TRUSTEE OF  
THE ESTATE OF METROPOLIS CON-  
STRUCTION COMPANY, A CORPORA-  
TION, BANKRUPT, DEFENDANT.**

Now comes John Daniel, Trustee of the estate of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled action, and for answer to Bill of Complaint, as amended, admits, denies and alleges as follows:

**I.**

Admits each and every allegation set forth in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XIa, XII, XIII, XV, XVI, XVII, XIX, XX, and XXI of said Bill of Complaint as amended.

**II.**

Denies the allegations of paragraphs XIV and XVIII of said Bill of Complaint as amended, except that defendant [89] Daniel admits that there has been an accounting between complainant and defendant Daniel had in this court in the matter of the estate of said bankrupt before the Referee herein, which said accounting cannot be fully and finally completed, and the various amounts due adjusted, unless and until the respective claims of the complainant and the defendant, Portuguese-Ameri-

can Bank of San Francisco, a corporation, to the Fourth Progress payment due the bankrupt on its contract with the City and County of San Francisco for the construction of sewers and appurtenances in Fourth and Kentucky Streets shall have been heard and determined; and in that behalf, defendant Daniel requires proof of the allegations of paragraphs XIV and XVIII of said Bill of Complaint as amended.

### III.

And defendant Daniel alleges, that on the 21st day of December, 1910, he, together with A. B. Tognazzi and Edmund F. Greene, were, by order of this Court duly given and made, appointed receivers of the estate of property of Metropolis Construction Company, a corporation, bankrupt herein; that said Receivers on said day duly qualified and immediately took possession among other things of the contract of said bankrupt with the City and County of San Francisco and proceeded to complete, and thereafter continued work upon (through Paul I. Welles, Complainant, sub-contractor), and completed, said contract; that thereafter, and on the 1st day of February, 1911, said Receivers resigned and delivered possession of all of the property of said bankrupt (including said bankrupt's rights under said Fourth and Kentucky Streets contract) to defendant Daniel, who, on said February 1st, was [90] appointed and qualified as Trustee of said bankrupt's estate, in accordance with an order of this Court herein duly given and made.

**WHEREFORE,** defendant Daniel joins the com-



plainant in his prayer for an accounting, and prays that said warrant be delivered up to him and the proceeds thereof ordered distributed, either to the general creditors of said bankrupt, or to secured creditors, as may be according to justice and equity.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorney for Defendant Daniel. [91]

[Duly verified February 5, 1911.]

Filed Sep. 5, 1911. [92]

---

[Answer of Portuguese-American Bank of San Francisco.]

[Title of Court and Cause.]

**THE ANSWER OF THE PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, A CORPORATION, ONE OF THE ABOVE-NAMED DEFENDANTS, TO THE AMENDED BILL OF COMPLAINANT, PAUL I. WELLES.**

Now comes said Portuguese-American Bank of San Francisco, a corporation, one of the defendants herein, not waiving but insisting upon its objections to the jurisdiction of this Court, and not consenting to its jurisdiction but expressly declining to consent to such jurisdiction, and not waiving the benefit of its demurrer to the jurisdiction of this Court heretofore interposed to said amended bill of complaint; and saving and reserving to itself now, and at all times hereafter, all and all manner of benefit and

advantage of exception which can or may be had or taken to the said amended bill of complaint, for answer thereto says:

I.

This defendant admits that the allegations of paragraphs I, II, III, IV, V and VI, of said amended bill of complaint are true. [93]

II.

This defendant admits that the allegations of paragraph VII, of said amended bill of complaint, down to and including the word "County," on line 19, page 4, are true; denies that the demand therein mentioned has been allowed by every officer, board, department and committee required by law to act thereon, and in this behalf avers that said demand has not been allowed by the Auditor of the City and County of San Francisco, and that said Auditor is an officer required by law to act thereon; admits that said demand was presented to said Auditor, Thomas F. Boyle, on or about January 6, 1911, for approval or allowance; admits that said demand is now in the hands of said Auditor; admits that prior to the commencement of this action defendant Trustee demanded of defendant Boyle that he approve and allow said demand and deliver it to said Trustee, and that said Boyle has failed and refused to so deliver said demand, and still fails and refuses to do so; denies that said defendant Boyle has not any good or sufficient reason for so failing and refusing to deliver said demand to said Trustee, and in this behalf avers that this defendant was at all said times, and is now, the owner of said demand by

assignment thereof for a present valuable consideration from the Metropolis Construction Company, a corporation, and was at the time of said demand upon said Boyle by said Trustee, and ever since has been, and is now, the owner of and entitled to the possession thereof; and that notice of defendant's claim to said demand was served on said Auditor prior to said demand by said Trustee; denies that said Auditor Boyle individually or as Auditor of said City and County of San Francisco, has not, or does not assert any claim to said demand or to the sum of \$6,830.85, or any part thereof, or any offset or counterclaim thereto, and in this [94] behalf avers that said Boyle individually and as Auditor does assert a claim to said demand; this defendant has not sufficient information on which to form a belief as to whether said City and County of San Francisco, or any officer, agent or department thereof, asserts or has any claim to said demand or money, or offset or counterclaim thereto, and for that reason denies that said City and County, or any officer, agent or department thereof, does not assert or has not a claim to said demand or money, or offset or counterclaim thereto, or to either; denies that the sole or only or any reason why said Boyle does not immediately deliver said demand for \$6,830.85 to said Trustee, is that there exists some doubt in the mind of said Boyle as to whether said Trustee, or complainant, or this defendant is rightfully entitled thereto, but on the contrary this defendant avers the reason is that defendant Boyle holds said demand for the person legally entitled thereto, and refuses

to deliver it to said Trustee in order to protect himself from liability in damages; denies that said Trustee is legally entitled, or entitled, to the possession of said demand.

### III.

Answering paragraph IX of said amended bill of complaint, defendant is informed and believes, and therefore alleges that the United Railroads of San Francisco, a corporation, asserts a claim and right in and to the demand of \$6,830.85, mentioned in paragraph VII, and for that reason denies that no person, firm or corporation asserts any claim, right, offset or counterclaim whatever to said demands or moneys or any part thereof, save only complainant, said defendant Trustee and this defendant.

### IV.

Admits that this defendant claims a right to said demand for [95] \$6,830.85, by virtue of an assignment thereof from the Metropolis Construction Company, bankrupt; denies that this defendant has no assignment thereof, or has no right to said moneys or any part thereof, and in this behalf avers that on December 6, 1910, this defendant loaned to said Metropolis Construction Company thirty thousand dollars in gold coin of the United States, and at the same time, for and in consideration thereof, and as part of the same transaction said Metropolis Construction Company assigned, set over and transferred absolutely to this defendant, the said demand and the moneys represented thereby; that ever since said December 6, 1910, this defendant has been and is the owner of said demand and moneys represented

thereby, and is entitled to the exclusive possession thereof.

V.

Admits that the statements of paragraph XI of said amended bill of complaint, are true.

VI.

Denies that the Board of Public Works never gave consent to any assignment to defendant Bank, as alleged in Paragraph XI-a.

VII.

This defendant denies, upon information and belief, that on July 30, 1910, or at any time, the Metropolis Construction Company made or entered into the agreement with complainant, mentioned in Paragraph XII of said amended bill of complaint.

VIII.

Admits that complainant has completed the construction of sewers and appurtenances in Fourth and Kentucky Streets, but denies on information and belief that said work was done under the agreement set forth in Paragraph XII, or in compliance with its terms or conditions; admits that said work was done in compliance with the [96] terms and conditions of the agreement between the Metropolis Construction Company and the City and County of San Francisco, for the construction of said sewers and appurtenances; admits that said work has been approved and accepted by said City and County.

IX.

Denies, on information and belief, that there remains due or owing to Paul I. Welles from the Metropolis Construction Company the sum of \$19,-



844.65, or any sum, under or by virtue of the contract mentioned in Paragraph XII between said Welles and said company, or that there are any set-offs or counterclaims in favor of said bankrupt against said Welles on said contract with said bankrupt; or that any offset is subject to deductions on behalf of said Welles by virtue of said contract with said bankrupt, or that there is now due or owing to said Welles from said bankrupt any sum of money whatever by virtue of or under said contract between said Welles and said bankrupt.

#### X.

Admits the allegations of paragraphs XV and XVI and XVII of said amended bill of complaint, to be true.

#### XI.

Denies on information and belief that there is any money available on the contract between complainant and said Metropolis Construction Company, mentioned in Paragraph XII of said amended bill of complaint; denies that any money is in the possession of defendant Boyle; denies that complainant has any claim against said bankrupt by virtue of said contract; denies that complainant is entitled by virtue of prior right, or any right, to the sum of \$6,830.85, or to the demand representing that sum; denies on information and belief that said Trustee denies said complainant's [97] claim in part, or at all; denies that said Trustee asserts that he is entitled thereto for the general creditors of the bankrupt.

#### XII.

Denies that out of the \$11,149.64 received by the

Trustee, as alleged in paragraph XIX of said amended bill of complaint, or at all, all claims against said fund have been paid or discharged, save only the claim of this defendant; defendant in this behalf alleges that the claim of the United Railroads of San Francisco, a corporation, against said demand and said sum of \$6,830.85, has not been paid or discharged, or released by said corporation.

**XIII.**

Admits that the allegations of paragraph XX of said amended bill of complaint are true.

**XIV.**

Admits that the allegations of paragraph XXI of said amended bill of complaint, down to and including the word "commanded," line 13, page 13, are true; denies that said application for a writ of mandate is a summary proceeding; denies that said State Court has no jurisdiction therein to hear and determine conflicting claims to said funds; admits that neither complainant nor defendant Trustee is a party to said mandamus proceeding; in this behalf defendant alleges that said alternative writ of mandate, together with summons and a copy of the complaint in said action, were served upon said Boyle prior to the commencement of this action.

**XV.**

Further answering said amended bill of complaint, this defendant alleges:

That it is, and was at all the times mentioned in said amended bill, a banking corporation duly organized and existing [96] under the laws of the State of California, and has and at all said times had

its principal place of business in San Francisco, California.

That for more than two years prior to the bankruptcy of the Metropolis Construction Company, a corporation, as set forth in said amended bill of complaint, said Metropolis Construction Company banked with this defendant, and obtained loans from this defendant to enable it to carry on its contracts, in the ordinary course of business.

That after the approval of the demand for the fourth progressive payment under the contract mentioned in paragraph VI of said amended bill of complaint, by the Board of Public Works of the City and County of San Francisco, on December 5th, 1910, as fully set forth in paragraph VII of said amended bill of complaint to which reference is hereby made, the said Metropolis Construction Company, on the 6th day of December, 1910, borrowed and received from this defendant the sum of thirty thousand dollars in gold coin of the United States, and at the same time, and as part of the same transaction, and as security for said loan of thirty thousand dollars, said Metropolis Construction Company, assigned, transferred and set over absolutely to this defendant the said demand for said fourth progressive payment and the money represented thereby, to wit: \$6,830.85, together with two other demands and moneys represented thereby, the three demands aggregating about \$38,000.00. That this defendant has ever since been, and now is, the owner of said demand, and said money represented thereby, and was at the time of the commencement of this action, ever since has been and now is entitled to the possession

of said demand and to receive the money upon it.

That this defendant has at all times subsequent to said 6th [99] day of December, 1910, claimed and claims said demand as the absolute owner thereof, and claimed and claims to be the sole party entitled to receive the money thereon.

That on December 7, 1910, this defendant made a further loan of \$5,000.00 to said Metropolis Construction Company, upon the said assignment.

That said loans bear interest at 7% per annum from date thereof, and that no part of said loans has been repaid, nor any of the interest accrued thereon; that there is due to this defendant on account of principal and interest on said loans the sum of \$35,000 gold coin of the United States, and interest accrued and to accrue at 7% per annum on \$30,000 from December 6, 1910, and of \$5,000 from December 7, 1910, in like gold coin.

That on the 22d day of July, 1910, and continuously ever since, the Charter of the City and County of San Francisco, contained the following provisions:  
**MATTERS UNDER CONTROL OF THE BOARD.**

Sec. 9. The Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors.

**DRAINAGE.**

2. Of all sewers, drains and cesspools, and of the work pertaining thereto or to the drainage of the City and County.

**CONDUITS; GARBAGE AND SEWAGE; SEWERAGE and DRAINAGE SYSTEM.**

7. Of any and all wires and conduits, the collec-

tion and disposal of street refuse, garbage and sewage, and the designing, construction and maintenance of the sewerage and drainage systems of the City and County.

Sec. 9—Art. VI—Chap. I. [100]

### ACCEPTANCE OF WORK.

Sec. 22. The work in this Article (Article VI) provided for must be done under the direction and to the satisfaction of the Board of Public Works;

When said work shall have been completed to the satisfaction and acceptance of the Board, it shall so declare by resolution, and thereupon the Board shall deliver to the contractor a certificate to that effect.

Sec. 22—Art. VI—Chap. I.

That after the said assignment to this defendant, said demand for said fourth progressive payment under the contract mentioned in paragraph VI of said amended bill, has never been in the possession of said Metropolis Construction Company, or of the said Trustee in Bankruptcy, or of the Bankruptcy Court.

That this defendant has never appeared in said Bankruptcy proceedings affecting said Metropolis Construction Company, mentioned in paragraph IV of said amended bill of complaint.

That when the said assignment was made, and the money loaned thereon, as aforesaid, no proceedings were pending against said Metropolis Construction Company affecting or involving its credit or solvency; that said loans were made in the ordinary course of business, and said assignment accepted as



security therefor in good faith by this defendant, and without notice or knowledge on its part, or on the part of any of its officers, that said Metropolis Construction Company was insolvent, or that its credit was in any way involved or impaired, or that insolvency or receivership proceedings were to be taken against it, or that said assignment would be a preference. [101]

That said assignment vested this defendant with the legal title to said demand for \$6,930.85, under the laws of the State of California, and that this defendant has ever since claimed, and still claims, said demand and the money represented thereby, adversely to said complainant, and to said defendant Trustee, and to said defendant Boyle.

WHEREFORE, this defendant prays that it be hence dismissed with its reasonable costs in this behalf sustained.

PORTUGUESE-AMERICAN BANK OF  
SAN FRANCISCO,

[Seal]

By J. A. SILVEIRA,

Vice-President.

JAMES B. FEEHAN,

Solicitor.

EDWARD LANDE,

Of Counsel. [102]

[Duly verified October 6, 1911.]

Received a copy of within answer October 6, 1911.

C. A. S. FROST,

Solicitor for Paul I. Welles.

Filed Oct. 6, 1911. [103]

[Title of Court and Cause.]

**Report of Referee [Filed October 14, 1911].**

To the Honorable the Judges of the *District of the United States* in and for the Northern District of California.

The undersigned, Referee in Bankruptcy, to whom, on the 11th day of July, 1911, the above-entitled cause was referred "to hear the testimony and find the facts upon all issues made by the pleadings and report the same to this Court," respectively reports as follows:

Said matter was brought on for hearing on the 8th day of August, 1911, and was continued from time to time until the 5th day of September, 1911, when the matter was submitted. The testimony and proceedings were taken in shorthand by Brainard C. Brown, and a transcript thereof is herewith submitted. I was attended upon said hearing by C. A. S. Frost, Esq., attorney for complainant, Milton J. Green, Esq., attorney for trustee, and James B. Feehan, Esq., and J. P. Allen, Esq., attorneys for Portuguese-American Bank. E. F. Moran, Esq., attended as attorney for Thomas F. Boyle.

John Daniel will hereinafter be referred to as the Trustee; the Metropolis Construction Company as the Company; the Portuguese-American Bank as the Bank; Thomas F. Boyle as the Auditor and the City and County of San Francisco as the City. No issues were [104] raised as to the identity of the respective parties or as to their respective positions or capacities as alleged in the bill of complaint.

The pleadings before the Referee are the bill of complaint as amended; the order to show cause, made herein on April 19, 1911; the answer of Auditor Boyle, which is also his return to said Order to Show Cause; the amended return of the Portuguese-American Bank to the Order to Show Cause.

This suit concerns the claims made by the various parties to a paper demand or warrant in the possession of the Auditor, and being a warrant for payment of the fourth progressive payment under a certain contract, hereinafter referred to, for the construction of sewers in Kentucky and Fourth Streets, San Francisco.

Prior to the taking of testimony the Bank saved its objections to the jurisdiction of the Court. The testimony and evidence adduced by the Bank are in support of its amended return filed to the Order to Show Cause.

I find the following facts: .

That during the year 1910 the Directors of the Company were Chris Emille, Mrs. Jensine P. Emille, his wife, and A. W. Reincke; that the officers of the Company were: Chris Emille, President and General Manager; A. W. Reincke, Treasurer; Mrs. Jensine P. Emille, Secretary; L. F. Strong, Assistant Secretary.

That from the first day of November, 1910, until the adjudication of bankruptcy of the Company, J. A. Baptista was vice-president of the Company and was assistant treasurer thereof; that during the year 1910 M. T. Frietas was president of the Bank; [105] V. L. de Figueiredo, secretary and cashier;

and James B. Feehan, the attorney thereof.

That in January, 1910, the board of directors of the Company duly passed a resolution conferring on Chris Emille, the president of the Company, the powers of general manager of the Company, "with full and exclusive charge of the management and conduct of the affairs of the Company, with full power to borrow money and to do and perform such other things as may be necessary from time to time to carry on and conduct the affairs of said Company"; that said resolution or authority conferred thereby was never cancelled or revoked by the Company (Ex. No. 4).

That on or about July 22, 1910, the Board of Public Works of the City entered into a contract with the Company for the construction of certain sewers and appurtenances in Kentucky and Fourth Streets for the estimated sum of \$33,182 (Tr. p. 6); that payments were to be made as the said work progressed, called "progressive" or "progress" payments, as provided in the specifications accompanying said contract, which are, in part, as follows:

#### **"PAYMENTS.**

In order to assist the contractor to prosecute the work advantageously, the City Engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

The first estimate shall be of the value of the labor done and materials incorporated into the herein proposed work since the contractor commenced the per-

formance of the contract on his part and every subsequent estimate except the final estimate shall be of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be [106] made, when in the judgment of the City Engineer the total value of the labor done and materials incorporated into the herein proposed work since the last preceding estimate amounts to less than \$5,000.00. Such estimates need not be made by strict measurements but they may be approximate only and shall be based upon the whole amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer's estimate.

Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contract is not complying with the requirements of the contract and specifications."

The specifications annexed to the contract contain the following provision:

"No sub-contract shall relieve the contractor of any liabilities or obligations. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto, unless



with like consent of the Board of Public Works."

That on or about the 30th day of July, 1910 (Tr. p. 18), this contract was sub-let by the Company of the complainant, Paul I. Welles. Under the sub-contract the Company agreed to pay to Welles 90 per cent of the moneys to be received by the Company from the City under its said contract with the City.

The Company proceeded with the work under the contract, through its sub-contractor, the complainant, until three receivers were appointed by this court on December 23, 1910. The contract was [107] completed by the complainant under the receivers and the trustee (Tr. pp. 18, 57).

That between the commencement of the work and December 5, 1910, three progress payments were made to the Company on the contract; that on December 3, 1910, the City Engineer made a fourth estimate of progressive work on the contract done prior to December 1, 1910, and his estimate amounted to \$9,107.80. (Tr. p. 48.) This estimate was approved by the Board of Public Works of the City on December 5, 1910. (Tr. p. 9.) Said board by resolution authorized a fourth progressive payment to be made to the Company in the sum of \$6,830.85. On the same day a demand for that amount on behalf of the Company was approved by the Board of Public Works, and the demand, so approved, was forwarded to the Board of Supervisors of the City. The said demand and estimate of the City Engineer are set out on pages 45 to 48 of the transcript.

That thereafter, on December 5, 1910, Chris

Emille, the president of the Company, accompanied by L. F. Strong, assistant secretary called at the office of the bank; that they saw V. L. de Figueiredo, the secretary and cashier of the Bank, and Mr. Emille asked him to let the Company have a loan of \$30,000, and offered as security to assign certain demands on the treasury of the City in favor of the Company, and the moneys represented thereby, aggregating about \$38,000; that Mr. de Figueiredo conducted Mr. Emille to the president of the bank, M. T. Frietas, for the purpose of negotiating said loan, and Mr. Frietas asked Mr. Emille what collateral the Company had to offer as security for the loan; that Mr. Emille produced an order on the Auditor of the City as follows (Tr. 117 to 123):

“San Francisco, Cal., December 5, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County of San Francisco.

Dear Sir:— [108]

You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco, is hereby authorized and empowered to draw the warrants in favor of the undersigned against City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

1st:—Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth Streets Sewers, the contract being between the un-

dersigned and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$12,173.17 being fourth progressive payment on account of contract between the undersigned and said City and County dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20 being fourth progressive payment on account of contract between the undersigned and said City and County dated June 22nd, 1910, and being for construction of sewer in 7th Street, Howard to Hubbell Streets under contract No. 31.

**METROPOLIS CONSTRUCTION COMPANY, INC.**

By CHRIS EMILLE,  
President.

By L. F. STRONG,  
Ass't. Secretary.

[Seal of Metropolis Construction Co.]

Received Auditor's Office Dec. 6, 1910.

Ans. H. J." [109]

That said warrant mentioned in said order for said fourth progress payment on said contract for sewers and appurtenances in Kentucky and Fourth Streets is the same demand that is sued for in this action.

That accompanying said order were three resolutions of said Board of Public Works, one of which allowed to the Company the sum of \$6,830.85 as the fourth progress payment under said contract. The other two resolutions are not involved in this suit.

That said resolution for the payment of the fourth

progress payment has not been revoked.

That when offered to the Bank on December 5, 1910, the said order on the Auditor did not bear the impress of the rubber stamp showing receipt at his office; that said bank officials refused to accept the said order as collateral for the loan asked until it had been presented at the Auditor's office and accepted by the Auditor (Tr. p. 117).

That on December 6, 1910, Mr. Strong went to the Auditor's office and had the order stamped with the words now appearing thereon "Received Auditor's office Dec. 6, 1910. Ans. H. J.," and left a copy of said order with the Auditor; that on December 6, 1910, the said order, so stamped, was turned over to said Bank officials and approved by them, and the loan of \$30,000 was authorized to be made to the Company; that when said Chris Emille turned over said order to the Bank he understood that it was an assignment for the Bank to draw the money from the treasury; that he intended that said order should be a complete assignment of the full amount of the three warrants set forth herein. A copy of the note for \$30,000 given to the Bank by the Company is to be found in the transcript, pages 67 and 68, and the resolution by the Board of Public Works allowing the fourth progress payment, on page 68. [110]

That said order with said resolution of the Board of Public Works attached and said note for \$30,000 were thereafter, on December 6, 1910, delivered to the Bank; that after receiving the same the Bank placed the sum of \$30,000 to the credit of the Company; that said \$30,000 was drawn out on checks by

the Company on the 6th and 7th days of December, 1910.

That on December 7, 1910, said Chris Emille, accompanied by L. F. Strong, again called at the office of the Bank; that Mr. Emille there saw Mr. de Figueiredo aforesaid and told him that the Company needed \$5,000 more to pay labor; that the Bank was amply secured by the assignment of \$38,000 made the day before and was sufficiently warranted in allowing \$5,000 more.

That the application was referred to the President of the Bank by Mr. de Figueiredo, and that the sum of \$5,000 more was on that day allowed by the Bank to the Company on the same security; that a second note was drawn up and delivered to the Bank, a copy of which note is to be found on page 71; that the said sum of \$5,000 was placed to the credit of the Company, and that the whole thereof, excepting \$1.06, was drawn out by the Company, on checks; that when said notes were made by the Company to the Bank, neither Mr. Frietas nor Mr. de Figueiredo had any knowledge, information or belief that the Company was not a solvent corporation, and did not know, and had no cause to suspect, that bankruptcy proceedings were contemplated by or against it; that they believed the reputation of the Company, financially, to be good at said times.

That no portion of the \$35,000 loaned by the Bank to the Company as aforesaid has been repaid to the Bank; that no portion of the interest thereon has been paid; that on August —, 1911, said interest amounted to the sum of \$1,714. [111]



That on Saturday, the 10th day of December, 1910, the Bank officials learned from the newspapers that the Company was in financial difficulties, and authorized the Bank's attorney, James B. Feehan, Esq., to look after the collection of said notes and notify the Auditor, the supervisors and the Board of Public Works that the Bank was the owner of the warrants set forth in said order: That on and about December 12, 1910, a letter was written to the Board of Supervisors at the instance of the president of the Board of Public Works, requesting that all demands against the City allowed to the Metropolis Construction Co. for work performed under the jurisdiction of the Board of Public Works be withheld from final passage, until otherwise notified. (Tr. p. 37.) On the same day, or shortly thereafter, certain demands, including the demand for the fourth progress payment, were returned to the Board of Public Works; that said last named demand there remained for about two weeks after such return; that on December 17, 1910, the Bank caused a letter to be filed with the Board of Supervisors, addressed to the Auditor and to the Board of Public Works and to the Board of Supervisors, notifying them of the claimed assignment to the bank for the fourth progress payment, together with other progress payments. A copy of the letter is marked "Defendant's Portuguese-American Bank Exhibit 5."

That on December 19, 1910, between 9:30 and 10 o'clock A. M., a copy of said letter was filed with the secretary of the Board of Public Works; that on December 19, 1910, about 9 o'clock A. M., a copy thereof

was left with the Auditor; that on January 4, 1911, a copy was left with the treasurer of the City.

That on December 19, 1910, at the hour of 11 o'clock and five minutes A. M., a petition was filed in this court praying that said [112] Company be adjudged a bankrupt.

That in November, 1910, the Bank made a loan under similar circumstances (Tr. p. 123) on the same kind of paper (Tr. p. 106) having reference to the third progress demand on said Fourth and Kentucky contract (Tr. pp. 132, 133), and being a paper in exactly the language of that given to the Bank by the Company on December 6, 1910, with reference to the fourth progress demand.

That all demands of this kind, after being approved by the Board of Public Works, the Board of Supervisors, and the Mayor, are received by the Auditor and by him delivered to the person shown to be entitled thereto, who takes the same to the City Treasury, there receiving the cash and leaving the demand, after signing his name on the back thereof, under the words "Received Payment" printed upon the demand. In the case of the third progressive payments upon which the Bank claims to have made similar loans, the demands were so receipted by L. F. Strong, assistant secretary of the company. When the demands for the third progress payments were ready for delivery, the Bank's cashier went to the Auditor's office. He was accompanied there by Chris Emille and L. F. Strong, whose name (L. F. Strong) appears in the body of the demands as the officer of the corporation by whom the demands were

made. (Tr. 133.) The cashier held an order empowering the Bank to draw the warrants in favor of the Company. (Exhibit 6.) The cashier received from the Auditor the paper demands for the third progress payments, such demands being in the name of the Metropolis Construction Co. when delivered to the cashier. The warrants were made out in the name of the Metropolis Construction Co. and for that reason Mr. Strong signed them. (Tr. p. 139.) Mr. de Figueiredo testified that the only thing the Auditor had was an order to deliver those orders to us (the Bank). [113] (Tr. p. 138, Ex. 6.) The cashier, Chris Emille and L. F. Strong, then went to the office of the City and County Treasurer, and Mr. Strong signed his name under the words "Received Payment." The money was taken away by the cashier, in an automobile, and taken to the Bank, Mr. Strong and Mr. Emille tendering the use of the automobile for that purpose.

That Mr. de Figueiredo, the cashier of the Bank, knew that the fourth progress payment required the approval of the Board of Supervisors before it could be paid (Tr. p. 124), but that on December 5, 1910, when the \$30,000 loan was made as aforesaid, he thought that the warrants had been passed upon by the Board of Supervisors, including the fourth progress payment.

That the demand aforesaid for the fourth progress payment, after being in the office of the Board of Public Works until about December 26, 1910, was returned to the Board of Supervisors, and was approved by said board on January 3, 1911, and re-

ceived the approval of the Mayor of the City on January 4, 1911 (Tr. pp. 29, 38, 47½, 72); that said demand for the fourth progress payment was in the possession of officials of the City from December 5, 1910, to January 6, 1911, and after January 6, 1911, was in the possession of the Auditor, and continuously since last named date has remained in his possession.

The provisions contained in the bill of complaint, paragraph XX, are provisions of the charter governing the city during the year 1910.

The Board of Public Works of the City has never given consent to any assignment to the Bank of said contract or of the fourth progress payment upon said contract, or any part thereof. (Tr. pp. 35, 36.)

On December 2, 1910 (Tr. p. 53) the Auditor received a letter from the Metropolis Construction Co., reading as follows: [114]

“San Francisco, Cal., December 2, 1910.

“To Thomas F. Boyle, City and County Auditor,  
San Francisco:

Dear Sir: Pay to the United Railroads of the City and County of San Francisco, the sum of \$2,-990.36, being sum to be deducted from moneys due us in the month of December, 1910.

Yours truly,

(Signed) METROPOLIS CONSTRUCTION  
CO., INC.

CHRIS EMILLE, Pres.

“[Seal of the Corporation attached.]”

Annexed to the answer of the Auditor in this case is a list of claims, Exhibit “D” These claims have

all been paid with the exception of Paul I. Welles, the complainant herein, out of the fifth and final payment on said Fourth and Kentucky contract for \$11,149.64, which was turned over to the trustee in bankruptcy.

Annexed to the answer of the Auditor is Exhibit "A," being a notice dated December 15, 1910, from the Empire State Surety Company, that the performance of work on the Fourth and Kentucky Street contract has ceased. The work on said contract never ceased, but was prosecuted continuously until the final completion and until it had been accepted by the City.

Exhibit "B," annexed to the answer of the Auditor, is a claim on behalf of the Central Trust Co. on account of money loan to the Metropolis Construction Co. The said Central Trust Co. has appeared in the bankruptcy proceedings and filed its claim as a general creditor.

Exhibit "C," attached to said answer, is a claim of the Pacific Coast Casualty Co. It makes no reference to the contract in question.

The Auditor makes no claim on his own account or on account of the City, to the demand in controversy, and the City makes no [115] claim thereto. The said demand for the fourth progress payment on its face is payable to the Metropolis Construction Co. (Tr. p. 471½.)

The Auditor, in order to protect himself, is holding said demand until it is determined who is entitled thereto.

That on December 23d, 1910 (Tr. p. 56), the Court,



in the case of Metropolis Construction Co., Bankrupt, appointed three Receivers, John B. Daniel, A. B. Tognazzi, and Edmund F. Greene. These receivers immediately qualified and took possession of all of the contracts of the Metropolis Construction Company with the City, of which there were several, including the Fourth and Kentucky Street contract (Tr. p. 56), continuing the work on this contract through the subcontractor, Mr. Paul I. Welles (Tr. p. 57).

Under the agreements of the Metropolis Construction Company with Mr. Welles, the receivers were obliged to furnish materials and some money in the completion of the contract.

That on the 29th day of December, 1910 (Tr. pp. 42, 43), the receivers notified the Auditor that they were the only persons lawfully entitled to receive or receipt for moneys due or payable from the City to the Metropolis Construction Co. and purporting to revoke any powers theretofore given by the bankrupt to the defendant Bank or the United Railroads of San Francisco.

That on February 1st, 1911, the receivers appointed by the Court resigned, and on the same day, without any interregnum, (Tr. p. 57), one of these appointees, Mr. John Daniel, was made Trustee of the bankrupt's estate, and qualified.

That on February 3d, 1911 (Tr. p. 41), the trustee notified the Board of Supervisors and the Auditor, protesting against the drawing by, or delivery to, the Bank or to the United Railroads of San Francisco, of any warrant or warrants for moneys owing to the

bankrupt by the City under any contracts entered into between [116] the corporation and the City. This protest was in writing and was served upon the Auditor on February 3d, 1911.

That final or fifth progress payment on this contract, together with the amount withheld, was paid over to the trustee in bankruptcy. This final payment amounted to \$11,149.64. (Tr. pp. 49, 50). The demand for this amount was delivered by the Auditor to the defendant John Daniel, as trustee of the estate of bankrupt, and the proceeds thereof used in partial payment of the secured claim filed by Paul L. Welles in bankruptcy proceedings.

That Paul I. Welles, the complainant, entered into a contract on July 30th, 1910, with the Metropolis Construction Co. to do all of the work under its contract with the City for the construction of sewers and appurtenances on Fourth and Kentucky Streets. Under the contractor, Metropolis Construction Co., and subsequently under the receivers and subsequently under the trustee, appointed by this Court, Mr. Welles prosecuted the work continuously and to final completion.

That on December 10th, 1910, Mr. Welles made a notice (Tr. p 23) to withhold under Section 1184 of the Code of Civil Procedure of the State of California, Exhibit "C" annexed to the Complaint. This notice was in the sum of \$8,500.00, and required the withholding of moneys due the Metropolis Construction Co., contractor, under the contract No. 6A. This notice is in the language of Exhibit "C" annexed to the complaint. Service of this notice was

acknowledged by the Auditor by telephone on December 10th, 1910, and it was actually served upon him on December 12th, 1910 (Tr. p. 44); upon the Board of Public Works, December 12th, 1910 (Tr. p. 33); and upon the Board of Supervisors of the City, December 12th, 1910 (Tr. p. 55).

That on December 15th, 1910, complainant herein made an amended [117] notice to withhold in the language of Exhibit "D" annexed to the complaint. This notice was served on the Auditor, on December 16th, 1910 (Tr. pp. 15-45); upon the Board of Public Works, December 16th, 1910 (Tr. pp. 16, 33, 34); and upon the City, December 19th, 1910, by service on the Mayor of the City (Tr. p. 16). It specifies the amount due the complainant as \$20,265.02. (Ex. "D" annexed to complaint, p. D6, lines 1-2).

That said notices to withhold are in the words and figures of Exhibits "C" and "D" annexed to the complaint and of similar notices marked Exhibits "A" and "B" annexed to the Proof of Secured Debt, filed by Paul I. Welles in the bankruptcy proceedings. (Tr. pp. 15, 55, 44, 45, 33, 34, 58, 130.)

That the complainant (Tr. pp. 17, 18) filed his proof of secured debt in this court in the matter of Metropolis Construction Co., bankrupt, on March 1, 1911, claiming \$20,462.67, and setting forth his claim of security as required by the bankruptcy law, and claiming a first lien upon all moneys due the bankrupt from the City by reason of the notices to withhold and the law of the State.

That the accounts of Paul I. Welles with the bankrupt have been settled with the trustee in bankruptcy

and allowed, subject to the alteration of certain items upon conditions named in the order of allowance. The amount found due Mr. Welles after partial payment by the trustee is \$13,010.26. (Tr. pp. 19-27.)

That \$5,782.21 of this was paid to Mr. Welles, leaving a balance due to him at the present time of \$7,228.05 (Tr. p. 19), upon the conditions named in the following paragraphs regarding two certain notes.

That there are two notes amounting to \$4,218.20 made by Mr. Welles and endorsed by the bankrupt (Tr. p. 20). The bankrupt has not been called upon to pay these notes (Tr. p. 20). It, however, [118] may be called upon to pay them, and the claim of Mr. Welles has been allowed for the amount due him, less said \$4,218.20; but it is provided in the order that, if Mr. Welles shall pay said notes himself, or produce satisfactory evidence that the bankrupt has been released from all obligation thereunder on account of its endorsement of the notes, his claim shall stand approved as of April 14, 1911, in the full amount found due him, to wit: \$8,792.06 plus \$4,218.20 or \$13,010.26, which, less the \$5,782.21 paid him on account through the Trustee, would leave then due Mr. Welles \$7,228.05.

That Mr. Welles stipulated on the hearing that if the demand here in dispute be turned over to the trustee in bankruptcy, he would upon receipt of the amount of the fourth progress payment on the Fourth and Kentucky Street contract, give his receipt for the amount of the notes referred to, and that the trustee might pay them for him out of that money

and thus release the Bankrupt (Tr. p. 135).

That on January 26, 1911, *mandamus* proceedings against the Auditor were commenced by the Bank to compel him to audit and deliver said demands, and others, to the Bank, and said proceedings are pending in the Superior Court of the State of California in and for the City and County of San Francisco, and that said Auditor has been served with an alternative writ of mandate and summons therein; that complainant herein never made a request on the trustee to bring an action for the recovery of the demand or warrant in dispute, and that the Trustee never refused to bring such suit.

That said Auditor has not appeared in said bankruptcy proceedings, nor is he a party thereto unless made so by process issued and his appearance in this suit.

That the Bank has not appeared in said bankruptcy proceedings, [119] and is not a party thereto.

The costs in this proceeding are as follows:

Paid by complainant to reporter...\$ 72.30

Paid by defendant to reporter..... 61.30

---

Total.....\$133.60

The referee has not been paid for his services, and he respectfully requests the Court to fix his compensation. Those services consist of attendance in hearing of the case, five days, and the preparation of this report.

ARMAND B. KREFT,  
Referee in Bankruptcy.

Dated San Francisco, October 13, 1911.



Filed Oct. 14, 1911, at 11 o'clock and 20 min. A. M.

[120]

---

[Title of Court and Cause.]

**Replication [to Answer of Portuguese-American  
Bank of San Francisco].**

**REPLICATION OF PAUL I. WELLES, COM-  
PLAINANT, TO THE ANSWER OF PORTU-  
GUESE-AMERICAN BANK OF SAN FRAN-  
CISCO, DEFENDANT.**

This replicant, Paul I. Welles, saving and reserv-  
ing to himself all and all manner of advantages  
of exception which may be had and taken to the  
manifold errors, uncertainties and insufficiencies  
of the answer of the defendant, Portuguese-Ameri-  
can Bank of San Francisco, a corporation, for rep-  
lication thereunto saith that he doth and will aver,  
maintain, and prove his said bill to be true, cer-  
tain, and sufficient in the law to be answered unto  
by the said defendant, and that the answer of the  
said defendant is very uncertain, evasive and in-  
sufficient in law to be replied unto by this replicant;  
without this, that any other matter or thing in the  
said answer contained, material or effectual in the  
law to be replied unto, and not herein and hereby  
well and sufficiently replied unto, confessed, or  
avoided, traversed or denied, is true; all which mat-  
ters [121] and things this replicant is ready to  
aver, maintain, and prove as this Honorable Court

shall direct and humbly prays as in and by his said bill he hath already prayed.

October 16th, 1911.

C. A. S. FROST,

Solicitor for Complainant.

Receipt of a copy of the within Replication this 16th day of October, 1911, is admitted.

JAMES B. FEEHAN,

Attorney for Defendant, Portuguese-American Bank of San Francisco.

Filed Oct. 16, 1911. [122]

---

[Replication to Answer of John Daniel, Trustee, etc.]

[Title of Court and Cause.]

REPLICATION OF PAUL I. WELLES, COMPLAINANT, TO THE ANSWER OF JOHN DANIEL, TRUSTEE OF THE ESTATE OF METROPOLIS CONSTRUCTION COMPANY, A CORPORATION, BANKRUPT, DEFENDANT.

This replicant, Paul I. Welles, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, for replication thereunto, saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of said defendant is very uncertain,

evasive and insufficient in law to be replied unto by this replicant; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant [123] is ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed.

October 19th, 1911.

C. A. S. FROST,

Solicitor for Complainant.

Due service and receipt of the within Replication is hereby admitted this 19th day of October, 1911.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

M. J. GREEN,

Attorneys for John Daniel, Trustee, etc., Defendant.

Filed Oct. 25, 1911. [124]

---

[Title of Court and Cause.]

**Memorandum Opinion Confirming Report of  
Referee, etc.**

There does not seem to be any objection to the report and findings of the referee, and said report is confirmed, and having fully considered said report and the pleadings herein, it is my conclusion that the complainant is entitled to the relief demanded

in the bill of complaint, and to its costs and disbursements herein.

This is not a proceeding in bankruptcy, but an independent suit in equity, and I find that the referee is entitled to be paid, as compensation for his services in this action, the sum of \$60.00.

**LET A DECREE BE ENTERED IN ACCORDANCE WITH THIS MEMORANDUM.**

Dated December 12th, 1911.

**JOHN J. DE HAVEN,**  
Judge.

Filed Dec. 12, 1911. [125]

---

**[Order Confirming Report and Findings of Referee,  
etc.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 12th day of December, in the year of our Lord one thousand nine hundred and eleven.  
Present: The Honorable JOHN J. DE HAVEN.

#15,148.

**PAUL I. WELLES**

**vs.**

**JOHN DANIEL, Trustee, etc., et al.**

This case having been heretofore submitted to the Court for determination, the Court now files its written memorandum, and by the Court ordered that the report and findings of the referee be, and the same is hereby confirmed; further ordered that complain-

ant is entitled to the relief demanded in the bill of complaint, costs and disbursements herein.

Further ordered that the special referee be, and he is hereby allowed \$60 for his services herein.

Further ordered that a decree be entered accordingly. [126]

---

[Title of Court and Cause.]

**Order [Confirming Report of Referee Granting Complainant an Injunction Pendente Lite, etc].**

Upon reading and filing the Order to Show Cause, made April 19, 1911, herein, the pleadings of the parties, and the findings and report of the referee, and after considering the briefs and arguments of counsel, it is

**ORDERED** that the said report of the referee herein be and the same is hereby confirmed and the referee is allowed sixty dollars for his compensation, one-half to be paid by complainant and one-half by defendant bank; and it is further

**ORDERED** that the complainant be and he is granted an injunction *pendente lite* restraining the defendant bank from prosecuting its mandamus proceeding referred to in said order to show cause, made April 19th, 1911, herein; and it is further

**ORDERED** that a writ of mandate issue requiring and directing the defendant, Thomas F. Boyle, to allow and approve the demand, to wit: The fourth progressive payment, in the sum of Six Thousand Eight Hundred Thirty and Eighty-five Hundredths (\$6,830.85) dollars, mentioned in the bill of com-



plaint, as [127] amended herein, and to deliver the same to defendant, John Daniel, as Trustee, herein, to abide the result of this action, the proceeds to be distributed to whomsoever shall be lawfully entitled; and it is further

ORDERED that the complainant file a bond or undertaking upon the issuance of the said injunction in the penal sum of Eight Thousand Dollars.

JOHN J. DE HAVEN,  
District Judge.

Dated December 13th, 1911.

Filed Dec. 13, 1911. [128]

---

[Title of Court and Cause.]

**Writ.**

(Injunction and Mandamus.)

The President of the United States of America, to Portuguese-American Bank of San Francisco, a Corporation, Defendant, and to Thomas F. Boyle, Defendant, and to Their, and Each of Their, Attorneys, Servants, and Agents, Greeting:

WHEREAS: It has been represented to us in our District Court of the United States for the Northern District of California, in the Ninth Circuit, on the part of Paul I. Welles, complainant, that he has lately exhibited his Bill of Complaint as amended, in our said District Court against you, the defendants above named, and John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant, touching the matters, therein, complained of; and our said Court having

thereupon, in this cause, ordered that said defendants show cause, [129] if any they have, at a time and place in said order specified, why the relief, prayed for in said Bill of Complaint, should not be granted, and said defendants having made return to said order and having appeared herein, by their respective counsel; and, thereupon, said matter having been fully heard upon said Bill of Complaint, as amended, said returns of said defendants, and upon the report of the Referee to whom said matter was referred for the purpose of taking evidence and finding facts herein, and upon the briefs and arguments of counsel; and upon the pleadings.

Now, therefore, we do strictly command and enjoin you, the said Portuguese-American Bank of San Francisco, a corporation, your attorneys, servants and agents, under the pains and penalties which may fall upon you, and each of you; in case of disobedience, that you desist and refrain from prosecuting, concerning the demand and proceeds hereinafter mentioned, that certain proceeding, mentioned in said Order to Show Cause, herein, made April 19, 1911, commenced January 26th, 1911, in the Superior Court of the State of California, in and for the City and County of San Francisco, by a petition filed in said Superior Court on the said last mentioned day, being numbered 33,836 in the records and files of said Superior Court, and now pending therein; which commands and injunctions, you are required to observe and obey, until said District Court shall make further order in the premises;

And we do strictly command, require and direct

you the said Thomas F. Boyle, to allow and approve that certain demand, to wit, for the fourth progressive payment on that certain contract, known as the Fourth and Kentucky Street contract, between the City and County of San Francisco, a municipal corporation and Metropolis [130] Construction Company, a corporation, bankrupt, mentioned in the Bill of Complaint, herein as amended, in the sum of Six Thousand Eight Hundred Thirty and Eighty-five Hundredths (\$6,830.85) Dollars, now held by you; and that you then immediately deliver said demand to John Daniel, defendant, herein, as Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, to abide the result of this action, the proceeds to be distributed to whomsoever shall be lawfully entitled; which command, requirement, and direction you are required to observe and obey under the pains and penalties which may fall upon you, in case of disobedience.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, the 15th day of December, Nineteen Hundred Eleven, and of the Independence of the United States of America the 136th year.

JAS. P. BROWN,

Clerk.

By Francis Krull,  
Deputy Clerk. [131]

**RETURN ON SERVICE OF WRIT.**

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Writ of Injunction and Mandamus on the therein named Thomas F. Boyle by handing to and leaving an attested copy thereof with Thomas F. Boyle personally at San Francisco in said District on the 15th day of December, A. D. 1911.

C. T. ELLIOTT,

U. S. Marshal.

By Paul J. Arnerich,

Deputy.

Filed Dec. 18, 1911. [132]

---

[Title of Court and Cause.]

**Order of Reference for Final Hearing.**

ORDERED, that this case be referred to A. B. Kreft, Referee, on final hearing, to hear the testimony and proofs of the parties, to find the facts upon the issues arising upon the pleadings, and to report his findings and conclusions to this Court.

Dated December 26, 1911.

JOHN J. DE HAVEN,

Judge.

Filed Dec. 26, 1911. [133]

**[Order Referring Cause to Referee to Hear Testimony and Proofs, to Find Facts upon Issues Arising on Pleadings and to Report Findings and Conclusions.]**

**[Title of Court and Cause.]**

On motion of C. A. S. Frost, Esqr., C. B. Feehan, Esqr., attorney for defendant Portuguese-American Bank, being present and making no objection, the Court made and filed its order referring this cause to A. B. Kreft, Referee, to hear the testimony and proofs of the parties, to find the facts upon the issues arising upon the pleadings, and to report his findings and conclusions to this Court. [134]

---

**[Report of Referee, Filed March 8, 1912.]**

**[Title of Court and Cause.]**

To the Honorable, the Judges of the District Court of the United States, Northern District of California:

The undersigned, Referee in Bankruptcy, to whom, on the 26th day of December, 1911, was referred the above-entitled cause "on final hearing, to hear the testimony and proofs of the parties, to find the facts upon the issues arising upon the pleadings and report his findings and conclusions to this Court," respectfully reports as follows:

That said matter was regularly set for hearing on the 9th day of January, 1912, on which day I was attended upon by C. A. S. Frost, Esq., attorney for complainant, by Milton J. Green, Esq., attorney



for trustee, and by James G. Feehan, Esq., and Charles J. Heggerty, Esq., attorneys for defendant Portuguese-American Bank. No appearance was made on behalf of defendant Thomas F. Boyle.

At the commencement of the hearing herein counsel for defendant bank stated of record that said bank "specially appears, without [135] consenting to the jurisdiction of the referee or to the jurisdiction of the court over the Portuguese-American Bank or its rights or property interests, and protests against and objects to the jurisdiction of the referee to hear or determine any matters or proceedings involving the issues raised by the complaint or bill and the answer thereto, as also to the jurisdiction of the District Court of the United States to determine the same."

The question was raised as to whether the findings of fact made by the undersigned referee upon the reference herein to him "to hear the testimony and find the facts upon all issues made by the pleadings and report the same to the court," which report was filed October 14, 1911, and confirmed by the Court, are *res adjudicata* as to the facts found. The referee held that the confirmation of such findings by the Court was *res adjudicata* where the issues raised by the answer of the bank herein are the same as the issues raised upon the order to show cause and pleadings, before the referee at the time of making said report, but that on the present hearing the parties might introduce evidence as to any new issues raised by the answer of the bank. The answer of the bank was filed October

6, 1911, before the report of the referee was filed, but such answer was not before the referee upon the former hearing.

After some discussion it was stipulated that the whole record of the former hearing should be admitted in evidence upon this hearing (Tr. pp. 7 and 8); such admission being limited on the part of complainant to the use of such record upon any issue presented by the answer of the bank not raised upon the hearing of the order to show cause.

In addition to such record certain stipulations were made and certain documentary evidence was referred to. Counsel for the [136] bank read in evidence a portion of the contract between the Metropolis Construction Company and the City and County of San Francisco, under the heading "Sub-Contracts," which is set out in the transcript filed herewith, page 8. Such contract was put in evidence upon the former hearing.

It was stipulated "that the Portuguese-American Bank at all times mentioned in the bill of complaint was, and is now a legally created and existing banking corporation, doing business as such in the City and County of San Francisco" (Tr. p. 8); and "that the charter of the City and County of San Francisco, as it existed June 1, 1910, and since then to the present time, may be deemed to have been offered and admitted in evidence, and such parts thereof as either party or any party to the action desires to refer to and use, may be referred to and used as evidence." (Tr. p. 8.) Counsel for the bank also put in evidence that portion of such

city charter as is quoted on page 8 of its answer, lines 13 to 25. (Tr. p. 9.) The complainant made the following admission: "That there was never any formal consent by the Board of Public Works to the sub-contract from the Metropolis Construction Co. to Paul I. Welles; it being also, however, admitted that Mr. Welles acted as sub-contractor with the knowledge of the Board of Public Works and of its inspector on the job, all the time, openly and without any concealment. He had his name in the telephone book, and he had his sign, 'Paul I. Welles,' as the sub-contractor on the job." (Tr. p. 9.)

It was admitted that the United Railroads, on January 4, 1912, filed a claim in the bankruptcy proceedings of the Metropolis Construction Company. The referee finds that this claim is based upon the claim referred to as the claim of the United [137] Railroads in the findings of fact heretofore made by the referee.

No additional facts other than those embraced in the admissions and as stated in this report have been elicited; and the referee finds the facts upon the issues arising upon the pleadings to be as reported by him in his former report, together with the additional facts set out in this report.

The matter was submitted on briefs, and the final brief was filed on February 28, 1912, at which time the respective parties and the referee were acting upon the assumption that the present order of reference required the referee to report his conclusions upon all the issues raised by the answer of the

bank. In the memorandum of opinion of the Court herein, filed December 12, 1911, the Court says: "There does not seem to be any objection to the report and findings of the referee, and said report is confirmed and having fully considered said report and the pleadings herein, it is my conclusion that the complainant is entitled to the relief demanded in the bill of complaint, and to its costs and disbursements herein."

Having considered the matter and having examined all the records and papers in the case, the referee is of the opinion that the additional facts adduced upon this hearing do not raise any new question which would affect the rights of the parties as determined by the Court in its said memorandum of opinion. Treating the confirmation of the referee's report on the former hearing as *res adjudicata* as to the facts found, it follows that if the complainant was entitled to the relief prayed for upon such facts, he is entitled to such relief upon the record as now presented.

The referee notified the respective counsel of complainant and [138] defendant bank of this conclusion and was attended upon by them on March 4, at which time the scope of this reference was discussed; and the referee finally determined to send up this report, setting forth the conclusion reached by him, and ask the Court for its instructions as to further proceedings, if any.

The costs of this proceeding are as follows:

Paid by complainant to reporter....\$8.00

Paid by defendant to reporter.....\$8.00

---

Total.....\$16.00

Respectfully submitted,

**ARMAND B. KREFT,**

Referee in Bankruptcy.

Dated San Francisco, March 9, 1912.

Papers transmitted herewith:

Transcript of proceedings on this reference;

Objection of Portuguese-American Bank of San Francisco to referee making and reporting conclusions of law;

Brief of defendant bank on final hearing;

Complainant's final brief;

Reply brief of defendant bank.

Filed Mar. 8, 1912. [139]

---

[Title of Court and Cause.]

**Exceptions of Defendant Portuguese-American Bank of San Francisco to Referee's Report on Final Hearing.**

The defendant Portuguese-American Bank of San Francisco, excepts to the report of Hon. Armand B. Kreft, to whom this cause was referred on final hearing by order of this Court made and entered on the 26th day of December, 1911, on the following grounds:

First: For that said Referee has not reported his findings or conclusions to this Court, as required by said order of reference.



Second: For that said Referee has not reported therein any findings or conclusions upon which a proper decree in this cause can be based.

Third: For that said Referee has treated the confirmation of his former report on the hearing of the order to show cause herein, as *res adjudicata*, as to the facts and the relief, and [140] has erred in so treating said order of confirmation.

Fourth: For that said Referee has treated the order confirming his former report as an opinion of the Judge of this Court, that upon the facts set forth in said report that the complainant was entitled to the relief prayed for in his bill of complaint. That said Referee has erred in so treating said order, for the only matter then before the Court, wherein this Bank was concerned, was whether the relief set out in the order to show cause should be granted, *prior* to the determination of the action upon the merits.

Fifth: For that said Referee at page 2 of said Report finds that the stipulation for the admission of the whole record on the former hearing, in evidence on this hearing, was "limited on the part of the complainant to the use of such record upon any issue presented by the answer of the Bank not raised upon the hearing of the order to show cause"; whereas, he should have found that it was stipulated that all the evidence, testimony, proceedings, stipulations, exhibits and the whole record, in the former hearing, be considered as evidence on this hearing, with the same force and effect as if repeated here, subject to the objection of complainant that the

Court has not now the right to take further testimony upon the issues embraced in the report of the Referee on said former hearing.

This defendant respectfully requests that this cause be rereferred to said Referee to report his findings and conclusions to this Court, as required by said Order by Reference.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,  
Solicitors for Said Defendant.

April 6th, 1912. [141]

Filed Apr. 6, 1912. [142]

---

[Title of Court and Cause.]

**Order Allowing Amendment to Prayer of Bill of Complaint.**

On motion of complainant, there being no objection made, it is

ORDERED that complainant be and he is hereby permitted to make, serve and file herein, his amendment, dated February 23d, 1912, to the Prayer of his Bill of Complaint herein; and that said Bill of Complaint be amended accordingly.

Dated April 15, 1912.

JOHN J. DE HAVEN,  
Judge.

Filed Apr. 15, 1912. [143]

**[Order Referring Cause to Special Referee and Examiner to Report Facts, and Granting Motion to Amend Complaint.]**

**[Title of Court and Cause.]**

The exceptions of defendant Portuguese-American Bank of San Francisco to the referee's report on final hearing herein, and the motion for leave to amend the bill of complaint herein, this day came on for hearing, Charles J. Heggerty, Esqr., and James B. Feehan, Esqr., appearing for said defendant, and C. A. S. Frost, Esqr., appearing for complainant;

After hearing counsel for respective parties, by the Court ordered that this cause be, and the same is hereby referred to A. B. Kreft, Esqr., as Special Referee and Examiner, to ascertain and report the facts on his conclusions of law therefrom, on the testimony taken and on file herein, on the issues joined, without any reference to the findings and report upon which a preliminary injunction was based.

Further ordered that said motion to amend the bill of complaint be, and the same is hereby granted.  
**[144]**

---

**[Title of Court and Cause.]**

**Amendment to Prayer of Bill of Complaint.**

Comes now the complainant, Paul I. Welles, and, by leave of Court thereunto, first had and obtained, makes and files the following amendment to the prayer of his Bill of Complaint in the above-entitled

action, now on file, and amends said prayer so as to read as follows, that is to say:

WHEREFORE, complainant prays that defendant Boyle, as Auditor, be required to surrender to defendant trustee, said Demand for Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars, the fourth progress payment, now held by him for account of said bankrupt; that said defendant Trustee, on behalf of said bankrupt, be required to account fully and finally with complainant; that defendant, Portuguese-American Bank, be required, by due process of this Court, to make answer hereunto and to assert herein its claim, if any it have, upon said demand, and to abide [145] the judgment and decree of this Court herein to be determined thereon; that said defendant bank, its attorneys, agents and servants, be perpetually enjoined from further proceeding with said application for a writ of mandamus in said Superior Court of the State of California; and that said defendant bank, in the meantime, be restrained from further proceeding with said mandamus application until the further order of this Court; and for an order directing said defendant bank in that behalf to show cause, if any it have, at a time and place therein to be stated, why it should not be so restrained.

1. That complainant is a creditor, holding security of the estate of Metropolis Construction Co., a bankrupt, according to the tenor of a certain order, allowing said claim and security, given and made in the matter of said bankrupt, pending in this court, numbered 6827, on the 13th day of April, 1911; and

2. That complainant, as such creditor, is entitled to payment in the course of administration of said bankrupt estate, out of any moneys, received by, or in possession of, the defendant, John Daniel, Trustee of the Estate of said bankrupt, from the City and County of San Francisco, State of California, as payment to the said bankrupt on account of that certain contract for the construction of sewers and appurtenances, in said City and County of San Francisco, known as the Fourth and Kentucky Street contract, number 6A; and

3. That complainant is entitled to payment out of the funds derived from said Fourth and Kentucky Street contract prior in order of payment, and in preference, to defendant Portuguese-American Bank of San Francisco, a corporation; and

4. That complainant be, and he is, granted a permanent [146] injunction against defendant, Portuguese-American Bank of San Francisco, a corporation, its officers, agents and attorneys, that it and they be perpetually enjoined from prosecuting, or in any manner proceeding with that certain action or proceeding wherein said banking corporation is plaintiff, and defendant herein, Thomas F. Boyle, auditor of the City and County of San Francisco, is defendant, commenced and filed January 26, 1911, in the Superior Court of the City and County of San Francisco, State of California, and numbered 33,836 in the records and files of said Superior Court; in so far as said action numbered 33,836 may, or does, concern a payment, or the demand therefor, or evidence thereof, known as the "fourth progress" pay-



ment alleged to be due Metropolis Construction Company, a corporation, on account of contract No. 6A, for the construction of sewers and appurtenances in Fourth and Kentucky Streets, San Francisco, California; and

5. Judgment against said defendant, Portuguese-American Bank of San Francisco, for complainant's costs and disbursements to be taxed.

And for such other and further relief as may be according to equity, and for his costs and disbursements herein.

PAUL I. WELLES,  
Complainant.

C. A. S. FROST,

Solicitor for Complainant. [147]

[Duly verified February 23, 1913.] [148]

---

[Title of Court and Cause.]

**Stipulation [That Amendment may be Made to  
Prayer of Complaint].**

The foregoing amendment may be made and filed;  
all rights of defendant bank being reserved.

---

Attorney for Defendant, Portuguese-American  
Bank of San Francisco.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for Defendant, John Daniel, Trustee.

EDWARD F. MORAN,

Attorney for Defendant, Thomas F. Boyle. [149]

Receipt of a copy of within Amendment this 15th day of April, 1912, is admitted.

**MORRISON, DUNNE & BROBECK,**

**GAVIN McNAB,**

**B. M. AIKINS,**

**MILTON J. GREEN,**

**Attorneys for John Daniel, Trustee, Defendant.**

**KNIGHT & HEGGERTY,**

**JAMES B. FEEHAN,**

**Attorneys for Portuguese-American Bank, a Corporation, Defendant.**

---

**Attorney for Thos. F. Boyle, Defendant.**

**Filed Apr. 16, 1912. [150]**

---

**[Title of Court and Cause.]**

**Report of Referee [Filed July 16, 1912].**

To the Honorable, the Judges of the District Court of the United States in and for the Northern District of California:

The undersigned, Referee in Bankruptcy, to whom on the 15th day of April, 1912, this cause was referred as special referee and examiner, to ascertain and report the facts and his conclusions of law therefrom, on the testimony taken and on file herein on the issues joined, "without any reference to the findings and report upon which a preliminary injunction was based," respectfully certifies and reports:

This cause was submitted to the referee upon the record as made upon the order to show cause and upon the previous reference to the referee to make

findings of fact upon the issues arising upon the pleading, and report his findings and conclusions to this Court, dated December 26, 1911; no additional evidence being introduced under the reference of April 15, 1912.

The appearances before me were C. A. S. Frost, Esq., attorney for complainant; James B. Feehan, Esq., and Charles J. Heggerty, [151] Esq., attorneys for defendant, Portuguese-American Bank; Milton J. Green, Esq., attorney for John Daniel, trustee. No appearance was made on behalf of defendant Thomas F. Boyle upon the present reference.

For convenience of reference John Daniel will hereinafter be referred to as the Trustee, the Metropolis Construction Company as the Company, the Portuguese-American Bank as the Bank, Thomas F. Boyle, Auditor of the City and County of San Francisco, as the Auditor.

Counsel for the bank announced that the bank reserved its objection and exception to the jurisdiction of the Court. The pleadings before the referee are the bill of complaint as amended, the answer of Auditor Boyle and answer of John Daniel, trustee, and the answer of the Portuguese-American Bank. Upon the issues joined I find the following facts:

That the Portuguese-American Bank at all times mentioned in the bill of complaint was, and is now, a legally created and existing banking corporation, doing business as such in the City and County of San Francisco; that John Daniel is a duly qualified and acting trustee of the estate of the Metropolis Con-

struction Company, bankrupt, No. 6827, pending in this court; that complainant, Paul I. Welles, is a citizen of the United States and of the State of California and a resident of Berkeley, in the northern district of said State; that Thomas F. Boyle, defendant herein, at all times mentioned in the complaint, continuously, has been the duly elected, qualified and acting auditor of the City and County of San Francisco; that the Metropolis Construction Company was at all times mentioned in the bill of complaint a corporation organized and existing under and by virtue of the laws of the State of California; that during the year 1910 the [152] directors of the company were Chris Emille, Mrs. Jensine P. Emille, his wife, and A. W. Reinicke; that the officers of the company were Chris Emille, president and general manager; A. W. Reinicke, treasurer; Mrs. Jensine P. Emille, secretary; L. F. Strong, assistant secretary.

That from the 1st day of November, 1910, until the adjudication of bankruptcy of the company, J. A. Baptista was vice-president of the company, and was assistant treasurer thereof; that during the year 1910 M. T. Frietas was president of the bank; V. L. de Figueiredo, secretary and cashier; and James B. Feehan, the attorney thereof.

That in January, 1910, the board of directors of the company duly passed a resolution conferring on Chris Emille, the president of the company, the powers of general manager of the company, "with full and exclusive charge of the management and conduct of the affairs of the company, with full power

to borrow money and to do and perform such other things as may be necessary from time to time to carry on and conduct the affairs of said company"; that said resolution or authority conferred thereby was never cancelled or revoked by the company.

That on or about July 22, 1910, the Board of Public Works of the city entered into a contract with the company for the construction of certain sewers and appurtenances in Kentucky and Fourth Streets for the estimated sum of \$33,182; that payments were to be made as the said work progressed, called "progressive" or "progress" payments, as provided in the specifications accompanying said contract, which are, in part, as follows:

#### **"PAYMENTS.**

"In order to assist the contractor to prosecute the work advantageously, the City Engineer shall on or about the last day of [153] each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

"The first estimate shall be of the value of the labor done and materials incorporated into the herein proposed work since the contractor commenced the performance of the contract on his part and every subsequent estimate except the final estimate shall be of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be made, when in the judgment of the City Engineer the total value of the labor done and materials incorporated into



the herein proposed work since the last preceding estimate amounts to less than \$5,000.00. Such estimates need not be made by strict measurements, but they may be approximate only and shall be based upon the whole amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

"Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer's estimate.

"Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contractor is not complying with the requirements of the contract and specifications."

The specifications annexed to the contract contain the following provision: [154]

"**SUB-CONTRACT:** The Contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof, without the consent or authorization of the Board of Public Works.

"With his request to the Board of Public Works for his permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of

the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together with such other information as will enable the Board of Public Works to determine the responsibility and standing of said sub-contractor.

"No sub-contractor will be considered unless the original contractor between the contractor and the Board of Public Works is made a part thereof, nor unless it appears to the Board of Public Works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sub-let, and to complete said work in accordance with these specifications and to the satisfaction of the Board of Public Works.

"No sub-contract shall relieve the Contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works."

That on or about the 30th day of July, 1910, this contract was sub-let by the company to the complainant, Paul I. Welles; that [155] there was never any formal consent by the Board of Public Works to the sub-contract from the Metropolis Construction Company to Paul I. Welles; that Mr. Welles acted as sub-contractor with the knowledge of the Board of Public Works and of its inspector of the job, all the time, openly and without any concealment; that he had his name in the telephone book and he had

his sign "Paul I. Welles" as sub-contractor on the job. Under the sub-contract the Company agreed to pay to Welles 90 per cent of the moneys to be received by the Company from the City under its said contract with the City.

The Company proceeded with the work under the contract, through its sub-contractor, the complainant, until three receivers were appointed by this court on December 23, 1910. The contract was completed by the complainant under the receivers and trustee.

That between the commencement of the work and December 5, 1910, three progress payments were made to the Company on the contract; that on December 3, 1910, the City Engineer made a fourth estimate of progressive work of the contract, and prior to December 1, 1910, and his estimate amounted to \$9,107.80. This estimate was approved by the Board of Public Works of the City on December 5, 1910. Said Board by resolution authorized a fourth progressive payment to be made to the Company in the sum of \$6,830.85. On the same day a demand for that amount on behalf of the company was approved by the Board of Public Works, and the demand so approved, was forwarded to the Board of Supervisors of the City. The said demand and said estimate of the City Engineer are set out on pages 45 to 48 on the transcript marked "Filed October 14, 1911."

That thereafter, on December 5, 1910, Chris Emille, the president of the Company, accompanied by L. F. Strong, assistant secretary, called at the office of the Bank; that they saw V. L. de Figueiredo,

[156] the secretary and cashier of the Bank, and Chris Emille asked him to let the Company have a loan of \$30,000, and offered as security to assign certain demands on the treasury of the city in favor of the Company and the moneys represented thereby, aggregating about \$38,000; that Mr. de Figueiredo conducted Mr. Emille to the president of the Bank, M. T. Frietas, for the purpose of negotiating said loan, and Mr. Frietas asked Mr. Emille what collateral the Company had to offer as security for the loan; that Mr. Emille produced an order on the Auditor of the City as follows:

"San Francisco, Cal., December 5, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County of San Francisco.

Dear Sir:

You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco, is hereby authorized and empowered to draw the warrants in favor of the undersigned against City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

1st:—Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth Streets Sewers, the contract being between the undersigned and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$12,173.17, being

fourth progressive payment on account of contract between the undersigned and said City and County dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20, being fourth progressive payment on account of contract between the undersigned [157] and said City and County dated June 22nd, 1910, and being for construction of sewer in 7th Street, Howard to Hubbell Streets, under contract No. 31.

**METROPOLIS CONSTRUCTION COMPANY, INC.**

By CHRIS EMILLE,  
President.

By L. F. STRONG,  
Ass't Secretary.

[Seal of Metropolis Construction Co.]

Received Auditor's Office. Dec. 6, 1910.

Ans. H. J."

That said warrant mentioned in said order for said fourth progress payment on said *construct* for sewers and appurtenances in Kentucky and Fourth Streets is the same demand that is sued for in this action.

That accompanying said order were three resolutions of said Board of Public Works, one of which allowed to the Company the sum of \$6,830.85 as the fourth progress payment under said contract. The other two resolutions are not involved in this suit.

That said resolution for the payment of the fourth progress payment has not been revoked.

That when offered to the Bank on December 5, 1910, the said order on the Auditor did not bear the



impress of the rubber stamp showing receipt at his office; that said bank officials refused to accept the said order as collateral for the loan asked until it had been presented at the Auditor's office and accepted by the Auditor.

That on December 6, 1910, Mr. Strong went to the Auditor's office and had the order stamped with the words now appearing thereon, [158] "Received Auditor's Office Dec. 6, 1910. Ana. H. J.," and left a copy of said order with the Auditor; that on December 6, 1910, the said order, so stamped, was turned over to said Bank officials and approved by them, and the loan of \$30,000 was authorized to be made to the Company; that when said Chris Emille turned over said order to the Bank, he understood that it was an assignment for the Bank to draw the money from the treasury; that he intended that said order should be a complete assignment of the full amount of the three warrants set forth therein. A copy of the note for \$30,000 given to the Bank by the Company is to be found in the transcript, pages 67 and 68, and the resolution by the Board of Public Works allowing the fourth progress payment, on page 68.

That said order with said resolution of the Board of Public Works attached and said note for \$30,000 were thereafter, on December 6, 1910, delivered to the Bank; that after receiving the same the Bank placed the sum of \$30,000 to the credit of the Company; that said \$30,000 was drawn out on checks by the Company on the 6th and 7th days of December, 1910.

That on December 7, 1910, said Chris Emille, ac-

accompanied by L. F. Strong, again called at the office of the Bank; that Mr. Emille there saw Mr. de Figueiredo aforesaid and told him that the Company needed \$5,000 more to pay labor; that the Bank was amply secured by the assignment of \$38,000 made the day before, and was sufficiently warranted in allowing \$5,000 more.

That the application was referred to the president of the Bank by Mr. de Figueiredo, and that the sum of \$5,000 more was on that day allowed by the Bank to the Company on the same security; that a second note was drawn up and delivered to the Bank, a copy of which note is to be found on page 71; that the said sum of \$5,000 [159] was placed to the credit of the Company, and that the whole thereof, excepting \$1.06, was drawn out by the Company, on checks; that when said notes were made by the Company to the Bank, neither Mr. Frietas nor Mr. de Figueiredo had any knowledge, information or belief that the Company was not a solvent corporation, and did not know, and had no cause to suspect, that bankruptcy proceedings were contemplated by or against it; that they believed the reputation of the company, financially, to be good at said times.

That no portion of the \$35,000 loaned by the Bank to the Company as aforesaid has been repaid to the Bank; that no portion of the interest thereon has been paid; that on August —, 1911, said interest amounted to the sum of \$1,714.

That on Saturday, the 10th day of December, 1910, the Bank officials learned from the newspapers that the Company was in financial difficulties, and author-

ized the Bank's attorney, James B. Feehan, Esq., to look after the collection of said notes and notify the Auditor, the supervisors and the Board of Public Works that the Bank was the owner of the warrants set forth in said order; that on or about December 12, 1910, a letter was written to the Board of Supervisors at the instance of the president of the Board of Public Works, requesting that all demands against the City allowed to the Metropolis Construction Company for work performed under the jurisdiction of the Board of Public Works be withheld from final passage, until otherwise notified. On the same day, or shortly thereafter, certain demands, including the demand for the fourth progress payment, were returned to the Board of Public Works; that said last named demand there remained for about two weeks after such return; that on December 17, 1910, the Bank caused a letter to be filed with the Board of [160] Supervisors, addressed to the Auditor and to the Board of Public Works and to the Board of Supervisors, notifying them of the claimed assignment to the Bank for the fourth progress payment, together with other progress payments. A copy of the letter is marked "Defendant's Portuguese-American Bank Exhibit 5."

That on December 19, 1910, between 9:30 and 10 o'clock A. M., a copy of said letter was filed with the secretary of the Board of Public Works; that on December 19, 1910, about 9 o'clock A. M., a copy thereof was left with the Auditor; that on January 4, 1911, a copy was left with the treasurer of the City.

That on December 19, 1910, at the hour of 11

o'clock and five minutes A. M., a petition was filed in this court praying that said Company be adjudged a bankrupt.

That in November, 1910, the Bank made a loan under similar circumstances on the same kind of paper, having reference to the third progress demand on said Fourth and Kentucky contract, and being a paper in exactly the language of that given to the Bank by the Company on December 6, 1910, with reference to the fourth progress demand.

That all demands of this kind, after being approved by the Board of Public Works, the Board of Supervisors, and the Mayor, are received by the Auditor and by him delivered to the person shown to be entitled thereto; who takes the same to the City Treasury, there receiving the cash and leaving the demand, after signing his name on the back thereof, under the words "Received Payment" printed upon the demand. In the case of the third progressive payment upon which the Bank claims to have made similar loans, the demands were so receipted by L. F. Strong, assistant secretary of the Company. When the demands for the third progress payments were ready for delivery, the Bank's cashier went to the Auditor's [101] office. He was accompanied there by Chris Emille and L. F. Strong, whose name (L. F. Strong) appears in the body of the demands as the officer of the corporation by whom the demands were made. The cashier held an order empowering the Bank to draw the warrants in favor of the Company. The cashier received from the Auditor the paper demands for the third progressive payments,

such demands being made in the name of the Metropolis Construction Company when delivered to the cashier. The warrants were made out in the name of the Metropolis Construction Company. The cashier, Chris Emille and L. F. Strong, then went to the office of the City and County Treasurer, and Mr. Strong signed his name under the words "Received Payment." The money was taken away by the cashier, in an automobile, and taken to the Bank, Mr. Strong and Mr. Emille tendering the use of the automobile for that purpose.

That Mr. de Figueiredo, the cashier of the Bank, knew that the fourth progress payment required the approval of the Board of Supervisors before it could be paid, but that on December 5, 1910, when the \$30,000 loan was made as aforesaid, he thought that the warrants had been passed upon by the Board of Supervisors, including the fourth progress payment.

That the demand aforesaid for the fourth progress payment, after being in the office of the Board of Public Works until about December 26, 1910, was returned to the Board of Supervisors, and was approved by the Board on January 3, 1911, and received the approval of the Mayor of the City on January 4, 1911; that said demand for the fourth progress payment was in the possession of officials of the City from December 5, 1910, to January 6, 1911, and after January 6, 1911, was in the possession of the Auditor, and continuously since last named date has remained in his possession. [162]

The provisions contained in the bill of complaint, paragraph XX, are provisions of the charter govern-



ing the City during the *City during the year 1910*. The quotations on page 8 of the answer of the Bank, lines 13 to 25, are provisions of the City charter.

The Board of Public Works of the City has never given consent to any assignment to the Bank of said contract or of the fourth progress payment upon said contract, or any part thereof.

On December 2, 1910, the Auditor received a letter from the Metropolis Construction Company, reading as follows:

"San Francisco, Cal., December 2, 1910.

To Thomas F. Boyle, City and County Auditor, San Francisco:

Dear Sir: Pay to the United Railroads of the City and County of San Francisco, the sum of \$2990.36, being sum to be deducted from moneys due us in the month of December, 1910.

Yours truly,

(Signed) METROPOLIS CONSTRUCTION CO.,  
INC.

CHRIS EMILLE,

Pres.

[Seal of the corporation attached.]"

The United Railroads on January 4, 1912, filed with the referee in the bankruptcy proceedings of the Company, a claim based upon the application which is the subject of this order.

Annexed to the answer of the Auditor in this case is a list of claims, Exhibit "D." These claims have all been paid with the exception of that of Paul I. Welles, the complainant herein, out of the fifth and final payment on said Fourth and Kentucky con-

tract for \$11,149.64, which was turned over to the trustee in bankruptcy.

Annexed to the answer of the Auditor is Exhibit "A," being a notice dated December 15, 1910, from the Empire State Surety Company, that the performance of work on the Fourth and Kentucky Street contract has ceased. The work on said contract never [163] ceased, but was prosecuted continuously until the final completion and until it had been accepted by the City.

Exhibit "B," annexed to the answer of the Auditor, is a claim on behalf of the Central Trust Company on account of money loaned to the Metropolis Construction Company. The said Central Trust Company has appeared in the bankruptcy proceedings and filed its claim as a general creditor.

Exhibit "C," attached to said answer, is a claim of the Pacific Coast Casualty Company. It makes no reference to the contract in question.

The Auditor makes no claim on his own account or on account of the City to the demand in controversy, and the City makes no claim thereto. The said demand for the fourth progress payment on its face is payable to the Metropolis Construction Company.

The Auditor, in order to protect himself, is holding said demand until it is determined who is entitled thereto.

On December 23d, 1910, the Court, in the case of Metropolis Construction Company, bankrupt, appointed three receivers: John B. Daniel, A. B. Tognazzi and Edmund F. Greene. These receivers im-

mediately qualified and took possession of all the contracts of the Metropolis Construction Company with the City, of which there were several, including the Fourth and Kentucky Street contract, continuing the work on this contract through the sub-contractor, Mr. Paul I. Welles. Under the agreements of the Metropolis Construction Company with Mr. Welles, the receivers were obliged to furnish materials and some money in the completion of the contract.

That on the 29th day of December, 1910, the receivers notified the Auditor that they were the only persons lawfully entitled to receive or receipt for moneys due or payable from the City to the Metropolis Construction Company, and purporting to revoke any [164] powers theretofore given by the bankrupt to the defendant Bank or the United Railroads of San Francisco.

That on February 1st, 1911, the receivers appointed by the Court resigned, and on the same day, without any interregnum, one of these appointees, Mr. John Daniel, was made Trustee of the bankrupt's estate, and qualified.

That on February 3d, 1911, the trustee notified the Board of Supervisors and the Auditor, protesting against the drawing by, or delivery to, the Bank or to the United Railroads of San Francisco, of any warrant or warrants for moneys owing to the bankrupt by the City under any contracts entered into between the corporation and the City. This protest was in writing and was served upon the Auditor on February 3d, 1911.

That final or fifth progress payment on this contract, together with the amount withheld, was paid over to the Trustee in bankruptcy. This final payment amounted to \$11,149.64. The demand for this amount was delivered by the Auditor to the defendant John Daniel, as Trustee of the estate of the bankrupt, and the proceeds thereof were used in partial payment of the secured claim filed by Paul I. Welles in the bankruptcy proceedings.

That Paul I. Welles, the complainant, entered into a contract, on July 30th, 1910, with the Metropolis Construction Company to do all of the work under its contract with the City for the construction of sewers and appurtenances on Fourth and Kentucky Streets. Under the contractor, Metropolis Construction Company, and subsequently under the receivers, and subsequently under the Trustee appointed by this court, Mr. Welles prosecuted the work continuously and to final completion.

That on December 10th, 1910, Mr. Welles made a notice to withhold under Section 1184 of the Code of Civil Procedure of the State of California, Exhibit "C" annexed to the complaint. This notice was in the sum of \$8,500, and required the withholding of [165] moneys due the Metropolis Construction Company, contractor, under the contract No. 6A. This notice is in the language of Exhibit "C" annexed to the complaint. Service of this notice was acknowledged by the Auditor by telephone on December 10th, 1910, and it was actually served upon him on December 12th, 1910; upon the Board of Public Works, December 12th, 1910; and upon the Board

of Supervisors of the City, December 12th, 1910.

That on December 15th, 1910, complainant herein made an amended notice to withhold in the language of Exhibit "D" annexed to the complaint. This notice was served on the Auditor, on December 16th, 1910; upon the Board of Public Works, December 16th, 1910; and upon the City, December 19th, 1910, by service on the Mayor of the City. It specifies the amount due the complainant as \$20,265.02.

That said notices to withhold are in the words and figures of Exhibits "C" and "D" annexed to the complaint and of similar notices marked Exhibits "A" and "B," annexed to the Proof of Secured Debt filed by Paul I. Welles in the bankruptcy proceedings.

That the complainant filed his proof of secured debt in this court in the matter of Metropolis Construction Company, bankrupt, on March 1, 1911, claiming \$20,462.67, and setting forth his claim of security as required by the bankruptcy law, and claiming a first lien upon all moneys due the bankrupt from the City by reason of the notices to withhold and the law of the State.

That the accounts of Paul I. Welles with the bankrupt have been settled with the Trustee in bankruptcy and allowed, subject to the alteration of certain items upon conditions named in the order of allowance. The amount found due Mr. Welles after partial payment by the Trustee is \$13,010.26. [100]

That \$5,782.21 of this was paid to Mr. Welles, leaving a balance due to him at the present time of \$7,228.05, upon the conditions named in the follow-



ing paragraph regarding two certain notes.

That there are two notes amounting to \$4,218.20 made by Mr. Welles and endorsed by the bankrupt. The bankrupt has not been called upon to pay these notes. It, however, may be called upon to pay them, and the claim of Mr. Welles has been allowed for the amount due him, less said \$4,218.20; but it is provided in the order that if Mr. Wells shall pay said notes himself, or produce satisfactory evidence that the bankrupt has been released from all obligation thereunder on account of its endorsement of the notes, his claim shall stand approved as of April 14, 1911, in the full amount found due him, to wit, \$8,792.06, plus \$4,218.20, or \$13,010.26, which, less the \$5,782.21 paid him on account through the Trustee, would leave then due Mr. Welles \$7,228.05.

That Mr. Welles stipulated on the hearing that if the demand here in dispute be turned over to the Trustee in bankruptcy, he would, upon receipt of the amount of the fourth progress payment on the Fourth and Kentucky Street contract, give his receipt for the amount of the notes referred to, and that the trustee might pay them for him out of that money and thus release the bankrupt.

That on January 26, 1911, mandamus proceedings against the Auditor were commenced by the Bank to compel him to audit and deliver said demands, and others, to the Bank, and said proceedings are pending in the Superior Court of the State of California in and for the City and County of San Francisco, and that said Auditor has been served with an alternative writ of mandate and summons therein; that

•

complainant herein never made a request on the [107] Trustee to bring an action for the recovery of the demand or warrant in dispute, and that the Trustee never refused to bring such suit.

That said Auditor has not appeared in said bankruptcy proceedings, nor is he a party thereto unless made so by the process issued and his appearance in this suit.

That the Bank has not appeared in said bankruptcy proceedings, and is not a party thereto.

### CONCLUSIONS.

There are two main questions presented.

First, whether the fourth progressive payment in question was due to the Company and was the proper subject of an assignment when the alleged assignment to the Bank was made.

Second, does the evidence show that an assignment thereof took place?

The contract between the City and the Company contains a provision that neither the contract nor the money payable thereunder should be assigned without the consent of the City. The consent of the City was not obtained upon the alleged assignment in question. An assignment is not void because of the failure to obtain such consent. Such a provision is for the protection of the City, and can only be invoked by the City. This point is covered by defendant's brief, page 6, filed February 2, 1912.

On December 5, 1910, the Board of Public Works authorized the fourth progressive payment to be made to the Company. After such authorization, and on December 6th, 1910, the Bank made its loan

of \$30,000, and for which it claims it was given an assignment of demand against the city aggregating about \$38,000. \$5,000 additional upon the same assignment was loaned on December 7th, 1910. The fourth progress demand was approved by the Board of Supervisors on January 3, 1911, and by the Mayor of the City on January 4, [166] 1911. The notices to withhold were made by complainant Welles on December 10, 1910, and December 15, 1910.

Complainant claims that the fourth progress payment did not become due until approved by the Board of Supervisors, and that Welles, having given his notices to withhold before such approval, has a prior right to the fund. (Complainant's Brief, page 29.)

The Bank claims that the payment was due when the demand was approved by the Board of Public Works.

Both parties claim to be sustained in their contentions by the case of Newport Wharf & Lumber Company against Drew, 125 Cal. 585.

This case, it seems to me, covers the law upon three points of this branch:

First, a notice to withhold is equivalent to a garnishment of the moneys then due or to become due to the contractor;

Second, an assignment of a payment may not be made before the payment is due;

Third, an assignment after a payment is due takes precedence over a subsequent notice to withhold. This case involved the assignment of progressive payments under a contract with the board of trustees of a State asylum. For the purpose of determining

the amount of the progressive payments, the contract provided that the Superintendent of Construction should make certain estimates of work done. A certificate showing the labor performed and materials furnished was prepared in the form of a bill of account on behalf of the contractor, with the approval of the Superintendent of Construction endorsed thereon, and was then presented to the board of trustees for allowance and order for payment. Upon the allowance and order for payment of this bill a warrant was drawn by the State Controller in favor of the trustees for payment of the amount found due, and delivered to [169] them. At page 589 the Court say:

"The provision in the contract for the payment of 90 per cent of the value of materials used and labor performed as the work progresses, with the condition that before any payment should be made, the Superintendent of Construction should, not oftener than once a month, furnish an 'estimate' of such labor and materials, with the amount due thereon, rendered such installment of the contract price due and payable immediately upon the acceptance of the work by the trustees. The contract provided that the work should be done to the satisfaction of the board of trustees, and the contractors were not entitled to demand payment of the amount of the estimate until after such approval and acceptance. Their approval of the estimate and direction for its payment implied their satisfaction with the work without any formal declaration to that effect. Upon such approval and direction the obliga-

tion of the State which had been created in favor of the contractors by the trustees, became complete, and the right of the contractors to immediate payment became vested in them and was subject to their disposition."

The contract in the case at bar is in terms between the Company and the Board of Public Works, but has been referred to herein by me as a contract with the City, and provides that the work shall be done "under the direction and satisfaction of said Board of Public Works," and, "the said Board of Public Works in behalf of the City and County of San Francisco promises and agrees that upon the performance and fulfillment of the covenants aforesaid the said City and County will pay or cause to be paid, in the manner provided by law, the Company for the work aforesaid. Following which is set out the prices fixed for the work. [170]

The contract then refers to the progressive payments for in the specifications annexed to and a part of the contract. Said specifications provide:

"That the City Engineer shall on or about the first day of each month make an estimate of the value of the labor done and the materials incorporated in the work. Upon each estimate being made the City shall pay or cause to be paid to the contractor in the manner provided by law an amount equal to 75 per cent of said City Engineer's estimate."

The charter of the City, Article 2, Chapter 1, Section 19, provides that all demands payable out of the treasury must, before they can be approved by the Auditor or paid by the City Treasurer, be first ap-



proved by the Board of Supervisors; all demands for more than \$200 shall be presented to the Mayor for his approval in the manner hereinbefore provided for the passage of bills or resolutions.

Article 3, Chapter 1, Section 15, provides that the supervisors shall authorize the disbursements of all public moneys except as otherwise specially provided in this chapter.

Counsel for complainant (Brief, page 27) contends that the Board of Public Works is a mere adjunct to the Board of Supervisors, merely a superintendent of streets, referring to Article 6, Chapter 1, Section 7, of the Charter: "The Board (of Public Works) shall be successor in office and shall have all the powers and perform all the duties of the superintendent of streets" et cetera; and counsel contends that the Board of Public Works is on a par, so far as authority is concerned, with the superintendent mentioned in the case of Newport News Company vs. Drew, who approved the demand in that case when they initiated, and that the trustees mentioned in the Drew case constituted [171] the Board having the final right to approve payments under the contract, which like right resides in the Board of Supervisors, and that in both cases the demands are subject to a further audit before the final payment, but that the indebtedness is created and fixed by the approval and passage by the Board of Trustees, in the one case, and by the Board of Supervisors in the other; that the Board of Public Works can oversee, initiate, protect, but cannot make an obligation to pay money.

I do not agree with counsel in this contention that the Board of Supervisors corresponds with the Board of Trustees in the Drew case, as the body whose approval was necessary before the progressive payments became due.

It will be noted that the contract is between the Company and the Board of Public Works, which Board, under the charter, is empowered to make such contracts on behalf of the City, and that the work is to be done under the direction and to the satisfaction of such Board, and said Board contracts and agrees that the City will pay in the manner provided by law for such work. The Board of Public Works and not the Board of Supervisors fixes the amount of the progress payments.

The resolution allowing the fourth progress payment reads:

“Resolved, that the Metropolis Construction Company be and is hereby allowed the sum of six thousand eight hundred and thirty dollars and eighty-five cents (\$6,830.85) as fourth progress payment on its contract for the construction of sewers and appurtenances in Kentucky Street and Fourth Street. Passed by the following vote: Ayes: Commissioners Newsom, Laumeister and Casey.

#### BOARD OF PUBLIC WORKS.

December 5, 1910.

Passed.” [172]

The specifications provide that the City Engineer shall make the estimates of work done; and if a parallel is drawn with the Drew case, he, in my opinion, would correspond to the superintendent of con-

struction therein mentioned, who endorsed his approval upon the bill of contractor, and which bill was ordered paid by the Board of Trustees. In like manner the Board of Public Works fixed and allowed the progressive payments upon the estimates of the City Engineer.

The contract provides that on the fulfillment of its covenants (which are the performance in a workmanlike manner, to the satisfaction of the Board of Public Works, of the work contracted), the City will pay or cause to be paid in the manner provided by law the payment provided in the contract, and progress payments provided in the specifications. The Board of Public Works is the body to determine when the company is entitled to these progress payments and to advise the supervisors that the payment is due, which latter body provides for the payment of the money. The steps required, after the amount is found due the contractor by the Board of Public Works as aforesaid, are the steps of payment in the manner provided by law, to wit: The order of the supervisors on the Auditor to draw the warrant and the payment of the warrant by the City Treasurer.

In the Drew case the Court further said, referring to the time when the demand was subject to assignment:

“The provision in the contract for payment of the contract price in controller’s warrants on the state treasury did not affect this power of disposition, or right to immediate payment or suspend its exercise until such warrant should be obtained. The failure

or neglect to obtain a warrant immediately upon the approval of the estimates would have no greater effect than a similar [173] failure on the part of the contractor in the case of an ordinary completed contract, to obtain a check from the owner immediately upon receiving the architect's certificate that the installment is payable."

For the foregoing reasons I am of the opinion that the fourth progressive payment became due the Company on the 5th day of December, 1910, when approved by the Board of Public Works, and that the Company had a vested right therein, which was assignable, and that if an assignment was in fact made to the Bank, the Bank is entitled to the moneys payable under the demand, notwithstanding the notices to withhold, made by Welles.

Counsel for complainant claims that the order given by the Company to the Bank, addressed to the Auditor, and the facts and circumstances attending the transaction, and the conduct of the parties relating thereto, do not give rise to an assignment to the Bank of the fourth progress payment in question. The order reads as follows:

"Thomas F. Boyle,

Auditor of the City and County of San Francisco.

Dear Sir: You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco is hereby authorized and empowered to draw the warrants in favor of the undersigned against the City and County for the amounts of money hereinafter set forth, and being progressive payments on account of the contract hereinafter set forth, to wit:

1st. Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5, 1910, for Kentucky and Fourth Street sewers, the contract being between the undersigned and said City and County under the bond issue of 1903." [174]

Which is the warrant in question? The order specifies other warrants, the total of warrants assigned aggregating \$38,171.32.

Counsel for complainant refers to the testimony of Mr. de Figueiredo, cashier of the Bank, quoting as follows: "The warrants were made out in the name of the Metropolis Construction Company, and the Auditor, the only thing that he had was an order to deliver those orders to us, although our name did not appear on the warrants, only on the order. Therefore, Mr. Strong signed them." The Mr. Strong referred to was the assistant secretary of the Company. Mr. de Figueiredo further testified in the same connection that "Mr. Strong signed the warrants at my suggestion and receipted for them at my suggestion."

This testimony related to a previous order given to the Bank upon a previous loan, and which order was in substantially the same words as the order in question, and complainant was permitted to show the conduct of the parties regarding such previous order for the purpose of showing the intention of the parties in regard to the warrant in question.

It further appears that on such previous order, when the warrant was ready for delivery, the cashier of the Bank and Mr. Strong went to the Auditor's



office and the warrant was delivered by the Auditor to the cashier; they then went to the treasurer's office and Mr. Strong, assistant secretary of the Company, endorsed the warrant and the money was turned over to the cashier, who took the same to the Bank.

The testimony shows that when the officers of the Bank were approached for the loan of \$30,000, Mr. Emille, president of the corporation, stated that as security for the loan they would give the Bank an assignment of certain demands, including said fourth progress demand. The officers of the Company and the officers of [175] the Bank all testify that an assignment of the said progress demands was intended. However it is a fair inference from the testimony that it was intended by the parties that the method followed on the previous transaction would be followed upon the collection of said demands, that is, that when the warrant was ready for delivery some officer of the Company would endorse the same in the same manner as upon the previous loan. I am satisfied from the evidence that the Bank did not intend to lend money without security, and that the Company offered as security to assign this demand. The security given the Bank by the Company was for a present consideration, and if I am right in my holding, that the payment was due the Company from the City, the claim, therefore, was property which the Company could rightfully assign. I am of opinion that the evidence clearly establishes that an assignment of the demand and not merely a right to receive the paper warrant from the Auditor was

intended; that it was not the intention of the Company to reserve any right for its own use or benefit or at all, either to revoke the order on the Auditor or to collect the money.

The language used by the United States Supreme Court in the case of *Fourth Street National Bank vs. Yardley*, 165 U. S. 634, on commenting on the facts in that case, I deem appropriate to the facts in the case at bar. This is a leading case, involving the doctrine of equitable assignment and held, quoting from the syllabi:

"While an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet if in the transaction connected with the delivery of the check it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of the specific fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers and parties charged with notice." [176]

With respect to the facts, the Court uses the following language:

"It could not be reasonable conceived that the loan would be made without reference to the assignment of the fund from which alone the hope of immediate payment was to be reasonably expected. . . . The transaction, therefore, was a proposition to borrow on the one hand, accompanied by the disclosure that security was necessary, and tendering the security, and on the other hand, an acceptance of such proposal and an advance made on the face of it."

The position of counsel for complainant is that said order on the Auditor, containing no words of conveyance, and it being necessary for an officer of the company to endorse the warrant before the same could be collected, the Company had not parted with control, and that no assignment of said demand has taken place.

Counsel for the Bank state in their brief that the Bank relies entirely upon its claim of assignment; that if it has not an assignment it has nothing. Many cases are cited. The counsel for complainant refers particularly to the case of *Christmas vs. Russell*, 14 Wallace, 69, 20 Law Edition, 762, in which the Supreme Court say:

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. A covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund, no authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignment. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor."

Counsel also refers to the case of the *Commercial National Bank vs. the City of Portland*, 37 Oregon, 33, a decision by Judge Bean, in which case the Court say: [177]

"An order from the contractor addressed to the

City Recorder, to deliver to the Company from time to time, as certain warrants shall be accepted, the warrants to be drawn by the City on a fund, equal in value to materials furnished by said Company used in such work, does not contain words of transfer or purport to assign an interest in the amount due or to become due from said City to said contractor, and is not directed to the Auditor or custodian of the funds, and hence is not a complete equitable assignment of the contractor's claim."

The Court further says:

"But, waiving this point," (the point that the order does not contain words of transfer, et cetera, which I have just quoted) "and assuming that in this respect the order is sufficient to constitute an equitable assignment, the fatal objection remains that it did not vest in the Fuel Company a right to the warrants or authorize the City Engineer to deliver them without the order of approval of Dill. It is only upon the presentation of bills for lumber, approved by Dill, that the City Recorder is authorized, under this order, to deliver warrants to the Fuel Company. The contract was not complete. Something remained to be done in the future by Dill before the right of the Company to the warrant should become absolute."

While the first portion of the decision quoted strongly supports the complainant's position herein, the latter quotation shows that the case is distinguished from the case at bar upon the facts.

The question has been briefed at length upon the assumption that the alleged assignment involves

the doctrine of equitable assignment. After a careful examination of the cases and the law of this State as found in the State codes and decisions of [178] the State courts, I am of opinion that the question presented does not involve the doctrine of equitable assignment.

The doctrine of equitable assignment as applied to choses in action arose because of the common law rule that choses in action were not assignable, and, as in other instances, equity found a method to accomplish what could not be done at law. Story in his work on *Equity Jurisprudence*, 13th Edition, Vol. 2, page 347, says:

"It is a well-known rule of common law that no possibility, right, title or thing in action can be granted to third persons. For it was thought that a different rule would be the occasion of multiplying contentions and suits, as it would in effect be a transfer of a law suit to a mere stranger. Hence a debt or other chose in action could not be transferred by assignment except in case of the king. . . . At law, with the exception of negotiable instruments and some few other securities, this still continues to be the general rule unless the debtor assents to the transfer; but if he does assent, then the right of the assignment is complete at law, so that he may maintain a direct action against the debtor upon an implied promise to pay him the sum, which results from such assent."

And at page 366, in discussing trusts and equitable assignments, he states the following:

"Indeed, any order, writing or act which makes



an appropriation of a fund amounts to an equitable assignment of that fund. The reason is that the fund being matter not assignable at law nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in equity. . . . An assignment of a debt may be by parole as well as by deed." [179]

The authorities all emphasize the necessity of an appropriation of the fund, and without which there can be no equitable assignment. As stated by Mr. Justice Story: "Appropriation is all the nature of the case admits." And this is the foundation of the doctrine. Out of this grew the holding that a failure to surrender control was inconsistent with an appropriation, that any power of revocation or power to collect was fatal to the assignment. But in this State, "under the code there is no limitation upon the power to assign choses in action, and such an assignment carries the legal title."

*Curtin vs. Kowalsky*, 145 Cal. 434.

And this is true even if the assignment is for security only.

In the case of *Gilman vs. Curtis*, 66 Cal. 116, the Court says:

"Conceding that it appears with sufficient certainty that the policy in question was assigned by the plaintiff to the defendant, to be held by him as collateral security for certain advances to be, and which were made by him, the legal title to the policy passed by the assignment to the defendant. The Court should not, therefore, have adjudged the plaintiff the owner of the policy, and entitled to receive

from the insurance company the whole amount due upon it. The interest of the plaintiff in the policy, upon that condition of facts, is in what remains of it after the advances, for the security of which it was assigned, have been satisfied, and defendant cannot be made to surrender it to plaintiff until the advances made by him are repaid."

There being no limitation upon the transfer of choses in action, the question as to whether or not an assignment took place is to be determined by the rules which govern the transfer and the passage of title to personal property. I find the following provisions in the Civil Code of this State, relating to this subject:

"Section 954: A thing in action arising out of the violation of the right of property or out of an obligation may be transferred by the owner."

"Section 1458: A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such." [180]

"Section 1044: What may be transferred. Property of any kind may be transferred, except as otherwise provided by this article."

The only exception mentioned in the article is under Section 1045: "Possibility. A mere possibility not coupled with an interest cannot be transferred."

"Section 1052: When oral. A transfer may be made without writing in every case in which a writing is not expressly required by statute."

The transfer in question does not come within Section 1624, "What contracts must be written."

"Section 1039: Transfer what? Transfer is an

act of the parties or of the law by which the title to property is conveyed from one living person to another."

"Section 1083: What title passes. A transfer vests in the transferee all the actual title to the thing transferred which the transferee then has unless a different intention is expressed or is necessarily implied."

"Section 1084: Incidents. The transfer of a thing transfers also all its incidents, unless expressly excepted. But the transfer *for* an incident to a thing does not transfer the thing itself."

"Section 1140: Transfer of title under sale. The title to personal property sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

I find no similar provision relating to assignments, but the rule undoubtedly applies to assignments. The word "sale" is applied to a transfer of title to property reduced to possession and the word "assignment" to a transfer of title to property not [181] reduced to possession.

Cross vs. Sacramento Savings Bank, 66 Cal. 466.

I am of opinion that every requirement of the code relating to the transfer of personal property is present in the transaction under consideration. The demand was the property of the Company. The Company intended to transfer it as security to the Bank, the Bank paid a present consideration, and the Company received it, and there was a present intent to transfer all the interest of the Company in the re-

spective claims against the City intended to be assigned, to be held by the Bank as security, and therefore the legal title passed to the Bank. What steps the Bank intended to take to collect the money, or what the Company agreed to do to help the Bank collect the money, is immaterial. As the holder of the legal title, the Bank could compel the Company to endorse the warrants or it could proceed against the City direct by suit, if the treasurer refused to recognize its authority to collect the warrants.

In the case of *Scheerer vs. Edgar*, 76 Cal. 569, the Court say:

"In this case the course of the Auditor in making his warrant payable to Friedhofer was proper, notwithstanding the assignment, because the judgment was payable to him, and the order of the Board of Supervisors directed that the amount should be so paid. Having drawn a proper warrant, the duty of the Auditor was ended, and he certainly cannot be compelled to draw a second warrant, still less, to draw one in favor of a party who is not entitled to it under the order of the Board. The assignment of the judgment gave to the plaintiff the right to the warrant when it was drawn, and to compel Friedhofer to execute a proper transfer thereof to him, if he refused to do so, but it did not give him the right to compel the Auditor to draw a warrant not authorized by law." [182]

Counsel for plaintiff states that this case is not in point, because this assignment was a legal assignment; that there was no question about the assignment; and further, that the statement of the Court

that Friedhofer could compel the endorsement, is *obiter dictum*. If I am correct in my conclusion that the facts constitute an assignment under the code, the assignment is a legal assignment. It is a transfer of the legal title to the Bank under the code, and the Bank stands in the same position as the judgment assignee in the Friedhofer case.

Considering the matter from the standpoint of an equitable assignment, I am also of opinion that the facts of the case constitute an equitable assignment within the rule of *Christmas vs. Russell*, above referred to. There was in fact a surrender of control, in that the Company was not in a position to collect the demand itself, it having parted with its right to receive the warrant, nor was it in a position to revoke the order upon the Auditor, the same having been given for a valuable consideration, nor to do anything by which it could control for its own use and benefit the claim due from the City. I believe that the control intended by the doctrine of equitable assignment is the retention by the assignor of some right over the fund which he is in position to enforce, either for his own benefit or for the benefit of another. I believe that a promise on the part of the company to endorse the warrant when the same should be ready, without any intention to reserve to itself the right to refuse to endorse the same—and the record does not show that the right to endorse this warrant was reserved by this Company for any purpose whatsoever—is not inconsistent with the existence of an equitable assignment. The thing assigned was not the warrant, but the demand or claim against



the City. The order on the Auditor is a sufficient appropriation. The words that the Bank is "authorized [183] and empowered to *draw* the warrants in favor of the Company" have a further significance than merely to receive the paper warrant, and in my opinion embraces the payment of the money to the Bank. The Bank could enforce its claim by suit against the City without endorsement of the warrant.

In the case of *McIntyre vs. Hauser*, 131 Cal. 11, the Court say:

"In order to constitute an equitable assignment of a debt, no express words to that effect are necessary, if from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment would have been held to have taken place."

Counsel for complainant emphasizes the words of *Christmas vs. Russell*, that "the intent to transfer *and its execution*" are indispensable. Under the rule as laid down in *McIntyre vs. Hauser*, if the intent to transfer title existed, the passage of title takes place. And I have found that such intent existed in the case at bar. If there is any inconsistency between the rule of *McIntyre vs. Hauser* regarding equitable assignment and the rule as laid down in *Christmas vs. Russell* and the other cases referred to, the rule as announced by the Supreme Court of this state is the controlling law between these parties.

As a conclusion of law I find:

That the fourth progressive payment in the sum of \$6,830.85 was on the 6th day of December, 1910,

assigned by the Company to the Bank as security for the repayment of loans amounting to \$35,000 made by the Bank to the Company, and that said assignment and the right of the Bank to receive the moneys due upon said fourth progress payment are not affected by the notices to withhold made by complainant. [184]

Respectfully submitted,

ARMAND B. KREFT,

Special Referee and Examiner.

San Francisco, July 12, 1912.

The costs of this proceeding are the *reparation* and expenses of this report, shorthand and typewriting, amounting to \$35.

The referee has received no compensation for his services herein, and respectfully requests the Court to allow a reasonable fee therefor.

Filed Jul. 16, 1912. [185]

---

[Title of Court and Cause.]

**Exceptions of Paul I. Welles, Complainant, to Report  
of Referee and Examiner.**

EXCEPTIONS of Paul I. Welles, Complainant, to the Report of Hon. Armand B. Kreft, Referee in Bankruptcy, as Special Referee and Examiner Herein, to Whom This Cause was Referred by Order of This Court Made and Entered on the Fifteenth Day of April, Nineteen Hundred Twelve, and Who Filed Said Report July Sixteenth, Nineteen Hundred Twelve.

The complainant excepts to said report:

**FIRST EXCEPTION:** For that said referee and examiner in said report, on page two thereof, has given the bankruptcy proceeding entitled "In the Matter of the Estate of Metropolis Construction Company, a Corporation, Bankrupt," the number 15,148, which is the number of this cause, whereas the said referee and examiner should have reported the number of said bankruptcy proceeding as number 6,827. [186]

**SECOND EXCEPTION:** For that said referee and examiner has in said report, on page fifteen thereof, stated as his conclusion that the Supreme Court of the State of California, in the case entitled "Newport Wharf & Lumber Company against Drew," 125 California Reports, 585, held, among other things, that "an assignment of a payment cannot be made before the payment is due," whereas the said referee and examiner should have concluded that the Court in said case against Drew held (not that an assignment could not be made at all, until the payment was due, but) that an assignment of a payment can not be made before the payment is **MATURED**, so as to take precedence over a notice to withhold.

**THIRD EXCEPTION:** For that said *fereree* and examiner in said report, on page sixteen thereof, finds that the contract with the city provides for the making of payments "in the manner provided by law" without mentioning, whereas said report should find, in that connection, that said *contrac* also provides that progress payments—like that involved in this action—"may at any time be withheld" upon certain stated conditions.

**FOURTH EXOEPTION:** For that said referee and examiner in said report, on page nineteen thereof, concludes that the fourth progress payment became due the Metropolis Construction Company, bankrupt, on the sixth day of December, 1910, when approved by the Board of Public Works and that said company had a vested right therein which was assignable and that if an assignment was in fact made to the bank, the bank is entitled to the moneys payable under the demand notwithstanding the notices to withhold made by Welles, whereas he should have concluded that in as much as the [187] demand for the fourth progressive payment, having been approved by the Board of Public Works December 5, 1910, and then "withheld" by that Board until after December 25, 1910, did not receive the approval of the Board of Supervisors until January 4, 1911, after Welles gave his notices to withhold (December 12 and 15, 1910), said fourth progressive payment was not **MATURED** until the said fourth day of January, 1911, nor at the time said notices to withhold were given by Welles, and that, consequently, the Metropolis Construction Company did not have any right to immediate payment thereof until January 4, 1911, nor at the time of said notices of Welles, and, hence, that the assignments or attempted assignments by said company on December 6th and 7th, 1910, to the Portuguese Bank were subject to the prior right. of Welles under said notices to withhold.

**FIFTH EXCEPTION:** For that said examiner and referee (on page twenty-six) in said report, con-

cludes that on December 6th and 7th, 1910, the Metropolis Construction Company, by borrowing money from the bank, intending to give it an assignment, but in fact given it a paper writing limiting its authority, to receiving a warrant, from the city auditor, not the fund holder, made out in the company's name, at some future undetermined date, operated to make the bank, on said 6th day of December, 1910, the equitable assignee of said fourth progressive payment; whereas he should have concluded that said state of facts did not operate to give the bank control over the said fourth progressive payment for the reason that said warrant or demand has not then (december 6, 1910) come into possession of the said Auditor, and did not come into his possession until January 6, 1911; and also for the reason that when the bank should [188] receive possession from the auditor (under the authority it had from the company) the City Treasurer (who was the fund holder) could not safely pay the same and would not be compelled to do so although forbidden by the company, because the warrant required the signature of the company in whose name it then existed, which could only be obtained by the bank through persuasion (consent) or force (a lawsuit), and, hence, that said bank did not acquire an equitable assignment as of said December 6, 1910, of said fourth progressive payment, nor as of any date prior to January 6, 1911, the date when the said demand came into actual possession of said city auditor.

**SIXTH EXCEPTION:** For that said referee and examiner in said report errs in concluding that



said company on December 6, 1910, transferred to the Portuguese-American bank, and said bank received, a legal title to the fourth progressive payment, and for that said conclusion is against law.

**SEVENTH EXCEPTION:** For that said examiner and referee in said report concludes that the fourth progressive payment in the sum of \$6,830.85 was on the 6th day of December, 1910, assigned by the Metropolis Construction Company to the Portuguese-American bank of San Francisco as security for the repayment of loans amounting to \$35,000, made by the bank to the company, and that said assignment and the right of the bank to receive the moneys due upon said fourth progressive payment are not affected by the notices to withhold made by complainant, whereas said referee and examiner should have concluded that said fourth progressive payment was not assigned by said company to said bank on December 6, 1910, or at all; also, [189]

**EIGHTH EXCEPTION:** For that said referee and examiner in his said report omitted to conclude, whereas he should have concluded that by the transactions of December 6, 1910, between the company and the bank and the paper received and accepted (and served upon the auditor) by the latter, the bank obtained, at most, merely a right to receive the warrant for said fourth progressive payment when it should come into the possession of the city auditor of San Francisco, which did not occur until January 6, 1911; also

**NINTH EXCEPTION:** For that said referee and examiner in his said report omitted to conclude,

where he should have concluded, that if any assignment exists in favor of said bank, arising from the facts found, it did not arise until January 6, 1911.

**TENTH EXCEPTION:** For that said referee and examiner in his said report omitted to conclude, whereas he should have concluded that any right which said bank may have acquired in said transaction of December 6, 1910, to said fourth progressive payment is subject to the notices to withhold made by complainant.

**ELEVENTH EXCEPTION:** For that said referee and examiner in his said report omitted to conclude, whereas he should have concluded that any right which said bank may have acquired in said transaction of December 6, 1910, to said fourth progressive payment is subject to the rights of the Trustee in Bankruptcy of said bankrupt, under the amendment of 1910, to the bankruptcy act, as "execution creditor."

**TWELFTH EXCEPTION:** For that said referee and examiner in said report did not conclude, whereas he should have concluded and found, that because no new testimony nor [190] evidence have been introduced on this hearing, his said report, filed July 16, 1912, being upon the facts as they stood of record on December 12, 1911, in this court and cause, between these parties, and because the facts as they thus stood of record on December 12, 1911, as appears by the report of this same referee and examiner then before the court (the transcript then on file being the identical transcript and evidence used on this hearing) are now, and were then, undisputed

facts and not findings upon any conflicting or contentious testimony, and because the court, on December 12, 1911, upon these admitted and established facts made its memorandum opinion and order directing a decree in favor of complainant (although it afterward made an interlocutory order whereby the bank should be given an opportunity to introduce further or new evidence if it desired, which it has not done); that such memorandum opinion and order of December is, under the unchanged state of the record, the law of the case in this court, and becomes conclusive, excepting only on review by an appellate court, and that complainant is, therefore, entitled to a decree as prayed. (*Lowe vs. California State Federation of Labor*, 189 Fed. Rep. 714, at page 715.—July 25, 1911, opinion by VAN FLEET, District Judge.)

**THIRTEENTH EXCEPTION:** For that said referee and examiner has in said report, on page twenty-one thereof, stated it as his opinion that the evidence clearly establishes that an assignment of the demand and not merely a right to receive the paper warrant from the auditor, was intended; that it was not the intention of the company to reserve any right for its own use or benefit or at all, either to revoke the [191] order on the auditor or to collect the money; whereas he should have, in said report, stated and found that the evidence in this cause is insufficient to establish that an assignment of the demand was intended, but establishes that merely a right to receive the paper warrant from the auditor was intended; that it was the intention of the company,

also, to reserve to itself the right to endorse the warrant, and also to be present at the collection of, and itself to collect, the money on the warrant, for the fourth progressive payment, and that it did in fact reserve to itself such right; also, that it did as a matter of law retain the right to revoke the order on the auditor, and also, to collect the money.

**FOURTEENTH EXCEPTION:** For that said referee and examiner in said report, on page six thereof, finds that when Chris Emille turned over said order to the bank he understood that it was an assignment for the bank to draw the money from the treasury, that he intended that said order should be a complete assignment of the full amount of the three warrants set forth therein; whereas he should have found and stated in said report that the evidence was insufficient to show said alleged facts, or any of them, and, also, that said Chris Emille then intended that said order should be merely authority for the bank to receive the warrants made out in the name of the construction company from the auditor when he should have them, thus making it incumbent upon the bank to request the company's signature before it could demand the money from the city treasury.

**WHEREFORE** complainant prays that an order be made directing a decree in favor of complainant as prayed for in his complaint as amended. [192]

August 14, 1912.

C. A. S. FROST,  
Solicitor for Complainant.

Receipt of a copy of within Exceptions this fourteenth day of August, 1912, is admitted.

JAS. B. FEEHAN,

CHARLES J. HEGGERTY,

Solicitors for Portuguese-American Bank of San Francisco, Defendant.

Filed Aug. 14, 1912. [193]

---

[Title of Court and Cause.]

**Exceptions of John Daniel, Trustee of the Estate of Metropolis Construction Company, a Corporation, Bankrupt, Defendant, to Report of Special Referee and Examiner.**

Now comes the defendant John Daniel, trustee of the estate of Metropolis Construction Company, a corporation, bankrupt, and excepts to the findings of fact and conclusions of law filed herein by Hon. Armand B. Kreft, special referee and examiner herein, in the following particulars, to wit:

1. Said defendant adopts in this behalf and presents the exceptions filed herein by Paul I. Welles, complainant, to said report.

2. Said defendant excepts to the finding of fact by said special referee that said Metropolis Construction Company, a corporation, bankrupt, did, on the 6th day of December, 1910, assign the several fourth progressive payments mentioned in the authorization to the Auditor of the City and County of San Francisco, amounting to about the sum of \$38,000, to the Portuguese-American Bank, as security for the repayment of loans amounting [194] to



\$35,000, made by said bank to said company, because said finding is not warranted or sustained by the evidence.

3. Said defendant excepts to the conclusion of law of said special referee that said authorization to the Auditor of the City and County of San Francisco, as shown on pages 5 and 6 of said report, constitutes a legal or equitable assignment of said several fourth progressive payments or of the moneys represented thereby, because said conclusion is contrary to law.

4. That said special referee erred in his conclusion of law that said authorization was not affected by the notices to withhold given said Auditor by complainant herein, for the reason that said conclusion is contrary to law.

Respectfully submitted,  
MORRISON, DUNNE & BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

Solicitors for Defendant, John Daniel, Trustee.

Receipt of a copy of the within is hereby admitted this 16th day of August, 1912.

JAMES B. FEEHAN,  
CHAS. J. HEGGERTY,  
Attorneys for Complainant.

Filed Aug. 16, 1912. [195]

[Title of Court and Cause.]

**Order Submitting Exceptions to Report of Special Referee and Examiner.**

The exceptions to the report of the special Referee and Examiner filed herein on July 16, 1912, this day came on for hearing, C. A. S. Frost, Esqr., appearing for and James B. Feehan, Esqr., and Chas. J. Heggerty, Esqr., appearing against said exceptions, and thereupon upon motion of said Attorneys by the Court ordered that said exceptions be, and they are hereby submitted to the Court for determination upon the briefs on file. [196]

---

**[Order Setting Aside Submission and Restoring Case to Calendar.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 19th day of December, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

By the Court ordered that the submission in each of the following cases be, and the same is hereby, set aside, and said cases restored to the calendar, to wit:

\* \* \* \* \*

#15148.

WELLES

vs.

DANIEL.

\* \* \* \* \*

[197]

---

[Title of Court and Cause.]

**Order Resubmitting Cause.**

Counsel for the respective parties being present in open court and consenting thereto, by the Court ordered that this cause be, and the same is hereby, re-submitted to the Court for decision, upon the briefs on file therein. [198]

---

**[Opinion.]**

[Title of Court and Cause.]

DIETRICH, District Judge.

Upon consideration I have become satisfied that the conclusion reached by the referee or examiner is correct and that his report should be approved. The contention urged under the complainant's "point one" has caused me some hesitation, for I have no disposition to render a decision at variance with the previous rulings in the case, but upon reflection I am persuaded that it was the intention of Judge De Haven in reopening the case that it should be considered or reconsidered upon its merits; and such seems to have been the understanding of the referee.

As to the "second" and "third points," it is thought that the transaction between the officers and the Portuguese-American Bank and of the Metropolis Construction Company on December 5th, 1910, operated to assign the claim in question against the city, from the company to the bank, and that under the rule of *Newport Wharf and Lumber Co. vs. Drew*, 125 Cal. 585, the notice to withhold came too late to create a lien in favor [199] of the plaintiff.

My first impression was that there were very strong equities in favor of the plaintiff, and that therefore the relief prayed for should be awarded if any legal reason could be found upon which to rest such a decree. But it appears that under the law he might have fully protected himself against the assignment to the bank and all other contingencies, by giving the notice to withhold when he first entered upon the work. This he negligently failed to do; if such notice had been given the bank probably would not have made the advancements. While the installment or payment in controversy was earned by the labor and outlay of the plaintiff, it is also true that the bank parted with its money in reliance upon the security which it supposed it was getting in the assignment. One or the other of the claimants must lose, and so far as the equities are concerned, the loss should fall upon him to whose carelessness or want of vigilance it is due. There is no room for a contention that the bank was wanting in proper care, and, upon the other hand, as already suggested, the plaintiff was careless in not giving the simple notice

until after the payment had been earned and the claim therefor in favor of the contractor had been approved. Added to this is the further consideration that in the contract with the city it was expressly provided that it should not be sub-let without first obtaining the approval of the city authorities. No application for such approval was ever made, nor until the belated notice to withhold was given were any of the city authorities ever formally or specifically advised of the rights or interests of the plaintiff.

A decree will go against the plaintiff and in favor of the bank. [200]

As to the compensation of the referee or examiner, he presents a statement in which the time which he has given to the matter is estimated to be about ten days; he will therefore be allowed One Hundred (\$100.00) Dollars for his services.

Filed Jan. 18, 1913. [201]

---

**[Order Entered January 18, 1913, Confirming Report of Referee and Directing Entry of Decree in Favor of Portuguese-American Bank of San Francisco, etc.]**

[Title of Court and Cause.]

This cause having been heretofore submitted to the Court for decision, now after due consideration had, the Court files its written decision, and by the Court ordered that the report of the referee herein be, and the same is hereby confirmed, and that a decree be entered in favor of the Portuguese-American



Bank of San Francisco, in accordance with the directions contained in said decision. Further ordered that the referee be, and he is hereby, allowed the sum of \$100, for his services herein. [202]

---

*In the District Court of the United States, for the  
Northern District of California, First Division.*

IN EQUITY—No. 15,148.

PAUL I. WELLES,

Complainant,

vs.

JOHN DANIEL, Trustee of the Estate of  
METROPOLIS CONSTRUCTION COM-  
PANY, a Corporation, Bankrupt; PORTU-  
GUESE-AMERICAN BANK OF SAN  
FRANCISCO, a Corporation, and THOMAS  
F. BOYLE,

Defendants.

**Decree.**

This cause came on to be heard upon the report of A. B. Kreft, Esq., special referee and examiner, dated July 12, 1912, and filed herein July 16, 1912, and upon the exceptions taken to said report on the part of complainant Paul I. Welles, and also on the part of defendant John Daniel, trustee, and on the part of Pacific Coast Casualty Company and no other exceptions or objections to said report having been made or filed; and said cause having been argued by counsel, was on the 15th day of January, 1913, submitted to the Court for final judgment and decree, and after due deliberation had thereon the Court

finds, orders, adjudges and decrees as follows:

That the exceptions, and each of them, taken to the report of the special referee and examiner filed herein July 16, 1912, on the part of complainant, and on the part of defendant John Daniel, trustee, and also on part of the Pacific Coast [203] Casualty Company, be, and the same are hereby overruled, and that said report be, and the same is hereby in all respects confirmed.

That the compensation of said referee and examiner be, and the same is hereby fixed at the sum of \$100 and his expenses and disbursements at the sum of \$35; and that the same shall be paid out of said sum and taxed as costs against complainant and the said defendant John Daniel, as such trustee.

That complainant take nothing by his amended bill of complaint against defendant Portuguese-American Bank of San Francisco.

That said complainant take nothing by his amended bill of complaint against defendants John Daniel, as trustee, and Thomas F. Boyle, Auditor of the City and County of San Francisco, or either of them.

That defendant Portuguese-American Bank of San Francisco has a good and valid assignment of the fourth progress payment of \$6,830.85 referred to in said report, and the demand therefor, and is the owner thereof and entitled to have and possess the same and all of the money due and payable thereunder; that said assignment and the right of the Bank to have and receive the said demand and the said money and the proceeds thereof were not, and are

not, affected by or subject to any notices to withhold made by complainant Paul I. Welles.

That defendant Portuguese-American Bank of San Francisco have and receive and recover from and be paid by the defendant John Daniel, as trustee herein, the said demand for said fourth progress payment in the said sum of \$6,830.85, and that said John Daniel, trustee, forthwith deliver the said demand properly endorsed by [204] him as such trustee to said defendant Bank, and, in the event that said John Daniel has cashed said demand and received the proceeds thereof, then that he pay over and distribute to said defendant Bank such cash and all of the proceeds of said demand, together with any and all interest the same may have earned to the date of such payment.

That the temporary injunction awarded against said defendant Bank by the Court December 13, 1911, do stand dissolved.

That said defendant Portuguese-American Bank of San Francisco have and recover its costs in this behalf expended to be taxed against the complainant and the said defendant John Daniel as such trustee herein.

Dated January 30th, 1913.

FRANK S. DIETRICH,

Judge.

Filed Jan. 30, 1913. [205]

[Title of Court and Cause.]

**Petition for Appeal by John Daniel, Trustee of the  
Estate of Metropolis Construction Company, a  
Corporation, Bankrupt, Defendant.**

The above-named defendant, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, feels himself aggrieved by the Decree made and entered on the 30th day of January, 1913, in the above-entitled case; and does hereby APPEAL from said Order and Decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith; and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said Order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. [206]

AND said defendant John Daniel, Trustee as aforesaid, says that the defendants Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, have refused to join in this appeal; and complainant, Paul I. Welles, also, has not joined herein; and the said John Daniel, Trustee as aforesaid, further prays that due notice may issue and be served upon said Portuguese-American Bank of San Francisco, a corporation, and upon said Thomas F. Boyle, defendants, and said Paul I. Welles, complainant above mentioned, requiring them to show cause why they should not join in this appeal, or

sever their interests from the interests of this appellant.

Dated February 3d, 1913.

A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

Solicitors for Defendant John Daniel.

Receipt of a copy of the within Petition for Appeal this 3d day of February, 1913, is admitted.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant. [207]

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant.

EDWARD F. MORAN,

Attorney for Thomas F. Boyle, Defendant.

Filed Feb. 4, 1913. [208]

---

[Title of Court and Cause.]

**Notice of Petition by Trustee in Bankruptcy for  
Severance on Appeal.**

The Portuguese-American Bank of San Francisco, a Corporation, and Thomas F. Boyle, defendants, and Paul I. Welles, complainant, above named, ARE HEREBY NOTIFIED that at 10:00 o'clock A. M., at the courtroom of said court in the United States postoffice and courthouse in San Francisco, California, on the 8th day of February, 1913, the under-



signed, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant above named, will present to said Court his Petition for Appeal from the Decree rendered and entered January 30th, 1913, in the above-entitled court and cause, in which controversy Paul I. Welles is complainant and Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, and the undersigned Trustee, are defendants, or opposing parties; [209]

AND said Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, defendants, and Paul I. Welles, complainant, ARE HEREBY NOTIFIED that the undersigned, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant, is about to take said appeal, and they are hereby notified to unite therein or failing this, they will be made appellees.

Dated February 3, 1913.

MORRISON, DUNNE & BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

Attorneys for John Daniel, Trustee of the Estate of  
Metropolis Construction Co., a Corporation,  
Bankrupt, Defendant.

Receipt of a copy of the foregoing Notice this 3d day of February, 1913, is admitted.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant.

C. A. S. FROST,  
Attorney for Paul I. Welles, Complainant. [210]

EDWARD F. MORAN,  
Attorney for Thomas F. Boyle, Defendant.  
Filed Feb. 4, 1913. [211]

---

[Title of Court and Cause.]

**Assignment of Errors, on Appeal of John Daniel,  
Trustee of the Estate of Metropolis Construction  
Company, a Corporation, Bankrupt, Defendant.**

NOW comes John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled action, and, having prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order and Decree of said District Court, made and entered on January 18th, 1913, respectfully represents, as grounds of appeal and as assignment of errors herein, that said District Court erred in the following particulars:

1. In holding Exceptions Nos. 2 to 13, inclusive, to the report of Special Referee and Examiner, Hon. A. B. Kreft, herein, as said Exceptions appear on file herein on behalf of Paul I. Welles, Complainant, dated August 14th, 1912, to be not [212] well

taken; and the action of said Court, in holding each of said Exceptions to be not well taken, is specified as error as to each of said Exceptions 2 to 13, separately and specifically, as though the same were herein set forth in separate paragraphs. (Said Exceptions Nos. 2 to 13 were expressly adopted and presented by this defendant, John Daniel, Trustee, as and for his Exceptions also to the report of said Special Referee and Examiner, by the written Exceptions of said defendant Trustee, duly made and filed in said Court and Cause within the time allowed by law.)

2. In holding that the fourth progressive payment in controversy in said suit became due the Metropolis Construction Company, a corporation, bankrupt, and matured on the 6th day of December, 1910.

3. In not holding that any assignment made by the Metropolis Construction Company on the 6th day of December, 1910, was subject to a prior right acquired by complainant, Paul I. Welles, under his Notices to Withhold, made by him according to the statute law of the State of California on December 15th, 1910.

4. In holding that the paper authorization made by the Metropolis Construction Company, on or about December 6th, 1910, accompanied by a loan of money, and the facts found by the Referee as having occurred on that day, operated to constitute an assignment in favor of the Bank of the fourth progressive payment.

5. In holding that the right of the Bank (if any) to receive the moneys due upon said fourth progress-

ive payment was not affected by the Notices to Withhold made by complainant. [213]

6. In not holding that said fourth progressive payment was not assigned by said Company to said Bank on December 6th, 1910.

7. In not holding that the paper authority and transactions of December 6th, 1910, between Metropolis Construction Company and the Portuguese-American Bank of San Francisco, operated merely to give said Bank a right to receive the warrant for said fourth progressive payment, if and when it should come into the possession of the City Auditor (defendant Boyle).

8. In not holding that if any assignment whatever existed in favor of said Bank, it did not arise until January 6th, 1911.

9. In not holding that any right which said Portuguese-American Bank might have acquired by virtue of the proceedings on December 6th, 1910, in said fourth progressive payment, is subject to the Notices to Withhold made by complainant Welles December 15th, 1910.

10. In not holding that any right which said Bank may have acquired in said fourth progressive payment is subject to the rights of the Trustee in Bankruptcy, defendant and appellant herein, under the Amendment of 1910 to the National Bankruptcy Act, by virtue of which said Trustee became "an execution creditor."

11. In not holding that the findings and report of said Special Master and Examiner, as adopted by the Order of said Court December 12th, 1911, were and are conclusive.

12. In that the evidence is insufficient to sustain the finding (adopted by the Court) of said Special Referee and Examiner, that said Metropolis Construction Company, a corporation, [214] bankrupt, did, on the 6th day of December, 1910, assign the several fourth progressive payments mentioned in the authorization to the Auditor of the City and County of San Francisco, amounting to about the sum of Thirty-eight Thousand Dollars (\$38,000.00), and including said fourth progressive payment, to the Portuguese-American Bank of San Francisco, as security for the repayment of loans amounting to Thirty-five Thousand Dollars (\$35,000.00) made by said Bank to said Company.

13. In not holding that the evidence establishes that it was the intention of the Metropolis Construction Company, in giving said written authority December 5th and December 6th, 1910, to said Portuguese-American Bank, to reserve the right to endorse the warrant, and to participate in the collection of the money on the warrant for the fourth progressive payment in controversy.

14. In not holding that said Metropolis Construction Company did, as a matter of law, reserve to itself the right to control the collection of said warrant for said fourth progressive payment.

15. In that the evidence is insufficient to justify the finding of said Special Referee and Examiner that when Chris Emille turned over said Order to the Bank on or about December 6th, 1910, he understood that it was an assignment for the Bank to draw the money from the treasury, and that he intended that



said Order should be a complete assignment of the full amount of the three warrants set forth therein.

16. In holding that said Portuguese-American Bank has any right whatever, paramount to the rights of said complainant Welles, to the warrant for said fourth progressive payment [215] or to the proceeds thereof.

17. In giving and making a Decree herein that defendant Portuguese-American Bank of San Francisco has a good and valid assignment of said fourth progress payment of Six Thousand Eight Hundred and Thirty and Eighty-five One Hundredths Dollars (\$6,830.85) referred to in the report of said Special Referee and Examiner, and the demand therefor, and is the owner thereof and entitled to have and possess the same and all of the money due and payable thereunder.

18. In giving and making his decree that said assignment and the right of the Bank to have and receive the said demand and the said money and the proceeds thereof were not, and are not, affected by or subject to any notices to withhold or to the said notices to withhold made by complainant Paul I. Welles.

19. In giving and making a decree that defendant Portuguese-American Bank of San Francisco have and receive and recover from and be paid by the defendant John Daniel, as trustee herein, the said demand for said fourth progress payment in the said sum of \$6,830.85, and that said John Daniel, trustee, forthwith deliver the said demand properly endorsed by him as such trustee, to said defendant Bank, and,

in the event that said John Daniel has cashed said demand and received the proceeds thereof, then that he pay over and distribute to said defendant Bank such cash and all of the proceeds of said demand, together with any and all interest the same may have earned to the date of such payment.

20. In giving and making a decree that the Temporary Injunction awarded against said defendant Bank by the Court December 13, 1911, do stand dissolved. [216]

21. In giving and making a decree that said defendant Portuguese-American Bank of San Francisco have and recover its costs in this behalf expended to be taxed against the complainant and the said defendant John Daniel as such trustee herein.

22. In giving and making a decree herein that complainant take nothing by his amended bill of complaint against the defendant Portuguese-American Bank of San Francisco.

23. In giving and making a decree herein that complainant take nothing by his amended bill of complaint against John Daniel, as trustee, and Thomas F. Boyle, Auditor of the City and County of San Francisco, or either of them.

24. In making or entering any decree or order in favor of said Portuguese-American Bank and against complainant Welles.

25. In not entering a decree in favor of complainant Paul I. Welles.

WHEREFORE, defendant John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, prays that the Order and

Decree of said District Court of the United States,  
be corrected and reversed.

A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

Solicitors for Defendant John Daniel, Trustee.

[217]

Receipt of a copy of within assignment of errors  
this 3d day of February, 1913, is admitted.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Cor-  
poration, Defendant.

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant.

EDWARD F. MORAN,

Attorney for Thomas F. Boyle, Defendant.

Filed Feb. 4, 1913. [218]

---

[Title of Court and Cause.]

**Petition by Complainant for Appeal.**

The above-named complainant, Paul I. Welles, conceiving himself aggrieved by the Order and Decree made and entered on the 30th day of January, 1913, in the above-entitled cause, DOES HEREBY APPEAL from said Order and Decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of

Errors, which is filed herewith; and he prays that this appeal may be allowed; and that a transcript of the record, proceedings, and papers upon which said Order and Decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 8th, 1913.

PAUL I. WELLES,

Complainant.

C. A. S. FROST,

Attorney for Complainant. [219]

The foregoing Claim of Appeal is allowed.

Dated February, —, 1913.

---

Judge.

Receipt of a copy of the within petition by complainant for appeal, this 8th day of February, 1913, is admitted.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for John Daniel, Trustee, etc., Defendant.

KNIGHT & HEGGERTY,

JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant.

EDWARD F. MORAN,

Attorney for Thomas F. Boyle, Defendant.

Filed Feb. 8, 1913. [220]

[Title of Court and Cause.]

**Assignment of Errors, on Appeal of Paul I. Welles,  
Complainant.**

NOW comes Paul I. Welles, complainant in the above-entitled action, and, having prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order and Decree of said District Court, made and entered on January 18th, 1913; respectfully represents, as grounds of appeal and as assignment of errors herein, that said District Court erred in the following particulars:

1. In holding Exceptions Nos. 2 to 13, inclusive, to the report of Special Referee and Examiner, Hon. A. B. Kreft, herein, as said Exceptions appear on file herein on behalf of Paul I. Welles, complainant, dated August 14th, 1912, to be not well taken; and the action of said Court, in holding each of said Exceptions to be not well taken, is specified as error as to each of said Exceptions 2 to 13, separately [221] and specifically, as though the same were herein set forth in separate paragraphs.

2. In holding that the fourth progressive payment in controversy in said suit became due the Metropolis Construction Company, a corporation, bankrupt, and matured on the 6th day of December, 1910.

3. In not holding that any assignment made by the Metropolis Construction Company on the 6th day of December, 1910, was subject to a prior right acquired by complainant, Paul I. Welles, under his Notices to Withhold, made by him according to the statute law of the State of California on December 15th, 1910.



4. In holding that the paper authorization made by the Metropolis Construction Company, on or about December 6th, 1910, accompanied by a loan of money, and the facts found by the Referee as having occurred on that day, operated to constitute an assignment in favor of the Bank of the fourth progressive payment.

5. In holding that the right of the Bank (if any) to receive the moneys due upon said fourth progressive payment, was not affected by the Notices to Withhold made by complainant.

6. In not holding that said fourth progressive payment was not assigned by said Company to said Bank on December 6th, 1910.

7. In not holding that the paper authority and transactions of December 6th, 1910, between Metropolis Construction Company and the Portuguese-American Bank of San Francisco, operated merely to give said Bank a right to receive the [222] warrant for said fourth progressive payment, if and when it should come into the possession of the City Auditor (defendant Boyle).

8. In not holding that if any assignment whatever existed in favor of said Bank, it did not arise until January 6th, 1911.

9. In not holding that any right which said Portuguese-American Bank might have acquired by virtue of the proceedings of December 6th, 1910, in said fourth progressive payment, is subject to the Notices to Withhold made by complainant Welles December 15th, 1910.

10. In not holding that any right which said Bank

may have acquired in said fourth progressive payment is subject to the rights of the Trustee in Bankruptcy, defendant and appellant herein, under the Amendment of 1910 to the National Bankruptcy Act, by virtue of which said Trustee became "an execution creditor."

11. In not holding that the findings and report of said Special Master and Examiner, as adopted by the Order of said Court December 12th, 1911, were and are conclusive.

12. In that the evidence is insufficient to sustain the finding (adopted by the Court) of said Special Referee and Examiner, that said Metropolis Construction Company, a corporation, bankrupt, did, on the 6th day of December, 1910, assign the several fourth progressive payments mentioned in the authorization to the Auditor of the City and County of San Francisco, amounting to about the sum of Thirty-eight Thousand Dollars (\$38,000.00), and including said fourth progressive [223] payment, to the Portuguese-American Bank of San Francisco, as security for the repayment of loans amounting to Thirty-five Thousand Dollars (\$35,000.00), made by said Bank to said Company.

13. In not holding that the evidence established that it was the intention of the Metropolis Construction Company, in giving said written authority December 5th and December 6th, 1910, to said Portuguese-American Bank, to reserve the right to endorse the warrant, and to participate in the collection of the money on the warrant for the fourth progressive payment in controversy.

14. In not holding that said Metropolis Construction Company did, as a matter of law, reserve to itself the right to control the collection of said warrant for said fourth progressive payment.

15. In that the evidence is insufficient to justify the finding of said Special Referee and Examiner that when Chris Emille turned over said Order to the Bank on or about December 6th, 1910, he understood that it was an assignment for the Bank to draw the money from the treasury, and that he intended that said Order should be a complete assignment of the full amount of the three warrants set forth therein.

16. In holding that said Portuguese-American Bank has any right whatever, paramount to the rights of said complainant Welles, to the warrant for said fourth progressive payment or to the proceeds thereof.

17. In giving and making a Decree herein that defendant Portuguese-American Bank of San Francisco has a good and valid assignment of said fourth progress payment of Six Thousand [224] Eight Hundred and Thirty and Eighty-five One Hundredths Dollars (\$6,830.85) referred to in the report of said Special Referee and Examiner, and the demand therefor, and is the owner thereof and entitled to have and possess the same and all of the money due and payable thereunder.

18. In giving and making his decree that said assignment and the right of the Bank to have and receive the same demand and the said money and the proceeds thereof were not, and are not, affected by

or subject to any notices to withhold or to the said notices to withhold made by complainant Paul I. Welles.

19. In giving and making a decree that defendant Portuguese-American Bank of San Francisco have and receive and recover from and be paid by the defendant John Daniel, as trustee herein, the said demand for said fourth progress payment in the said sum of \$6,830.85, and that said John Daniel, trustee, forthwith deliver the said demand properly endorsed by him as such trustee, to said defendant Bank, and, in the event that said John Daniel has cashed said demand and received the proceeds thereof, then that he pay over and distribute to said defendant Bank such cash and all of the proceeds of said demand, together with any and all interest the same may have earned to the date of such payment.

20. In giving and making a decree that the Temporary Injunction awarded against said defendant Bank by the Court December 13, 1911, do stand dissolved.

21. In giving and making a decree that said defendant Portuguese-American Bank of San Francisco have and recover its [225] costs in this behalf expended to be taxed against the complainant and the said defendant John Daniel as such trustee herein.

22. In giving and making a decree herein that complainant take nothing by his amended bill of complaint against the defendant Portuguese-American Bank of San Francisco.

23. In giving and making a decree herein that

complainant take nothing by his amended bill of complaint against John Daniel, as trustee, and Thomas F. Boyle, Auditor of the City and County of San Francisco, or either of them.

24. In making or entering any decree or order in favor of said Portuguese-American Bank and against complainant Welles.

25. In not entering a decree in favor of complainant Paul I. Welles.

WHEREFORE, complainant, Paul I. Welles, prays that the Order and Decree of said District Court of the United States be corrected and reversed.

C. A. S. FROST,

Attorney for Complainant, Paul I. Welles.

Receipt of a copy of the within Assignment of Errors, on Appeal of Paul I. Welles, complainant, this 8th day of February, 1913, is admitted.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN, [226]

Attorneys for John Daniel, Trustee, etc., Defendant.

KNIGHT & HEGGERTY,

JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant.

EDWARD F. MORAN,

Attorney for Thomas F. Boyle, Defendant.

Filed Feb. 8, 1913. [227]



[Title of Court and Cause.]

**Consent of Paul I. Welles, Complainant, to Unite  
With John Daniel, Trustee of the Metropolis  
Construction Company, a Corporation, Bank-  
rupt, Defendant, in Appeal.**

COMES NOW Paul I. Welles, complainant in the above-entitled action, and, for answer to the Notice of John Daniel, Trustee, defendant, requiring him to show cause why he should not join in the appeal of said John Daniel, Trustee, defendant, states to the Court that he desires to unite in said appeal and does hereby unite therein with said John Daniel, Trustee as aforesaid; that he has filed herein his Assignment of Errors and Petition for Allowance of Appeal and respectfully prays that the same be now allowed.

Dated, February 8th, 1913.

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant. [228]

Receipt of a copy of within Consent to Unite in Appeal this 8th day of February, 1913, is admitted.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for John Daniel, Trustee, Defendant and Appellant.

Filed Feb. 8, 1913. [229]

[Title of Court and Cause.]

**Order Granting Appeal, Severing Codefendants and  
Allowing Supersedeas.**

The defendant, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled controversy arising out of a bankruptcy proceeding now pending in our said court, having heretofore filed herein his Petition for Appeal and his Assignment of Errors, and having given notice to the Portuguese-American Bank of San Francisco, a corporation, defendant, and to Thomas F. Boyle, defendant, and to Paul I. Welles, complainant; and the said Portuguese-American Bank and the said Thomas F. Boyle, defendants, appearing, and said complainant, Paul I. Welles, having appeared and filed herein his Assignment of Errors and Petition and having united with said Trustee in said Appeal, said Appeal is **ALLOWED**; and [230] said Portuguese-American Bank, a corporation, defendant, and said Thomas F. Boyle, defendant, may be made appellees. Said Appeal is to operate as a supersedeas of the Decree appealed from upon complainant giving a bond in the sum of \$1,000.

Dated, February 10th, 1913.

WM. C. VAN FLEET,  
Judge.

Filed Feb. 10, 1913. [231]

[Title of Court and Cause.]

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, That we, Paul I. Welles, as principal, and United States Fidelity and Guaranty Company, a corporation, of Maryland, as surety, are held and firmly bound unto Portuguese-American Bank of San Francisco, a corporation, and unto Thomas F. Boyle, in the full and just sum of One Thousand Dollars (\$1,000), to be paid to the said Portuguese-American Bank of San Francisco and to said Thomas F. Boyle, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

SEALED with our seals and dated this 13th day of February, in the year of Our Lord One Thousand Nine Hundred and Thirteen.

WHEREAS, lately, at the District Court of the United States for the Northern District of California, in a suit [232] depending in said court, between Paul I. Welles, complainant, and John Daniel, Trustee of the Metropolis Construction Co., a corporation, Bankrupt, Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, defendants, a decree was rendered against the said Paul I. Welles and also against said John Daniel, as Trustee of said Metropolis Construction Co., a corporation, bankrupt, and the said Paul I. Welles having obtained an Appeal and filed a copy thereof in the Clerk's office of the said Court, to reverse the

decree in the aforesaid suit, and a Citation directed to the said Portuguese-American Bank of San Francisco, a corporation, and the said Thomas F. Boyle, defendants, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco in said Circuit on the 10th day of March next.

NOW, the condition of the above obligation is such that if the said Paul I. Welles shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

IN WITNESS WHEREOF, the said Paul I. Welles, as principal, has hereunto subscribed his name and affixed his seal, and the said United States Fidelity and Guaranty Company, a corporation, of Maryland, has caused its name to be hereunto subscribed and its seal hereunto affixed by its attorney in fact thereunto duly authorized the day and year first above written.

PAUL I. WELLES. [Seal]  
Principal.

Witness:

C. A. S. FROST,

To Signature of Paul I. Welles. [233]

UNITED STATES FIDELITY AND  
GUARANTY COMPANY.

B. P. OAKFORD,

Its Attorney in Fact.

W. L. ALEXANDER,

Attorney in Fact.

Approved, February 13th, 1913.

[Seal]

WM. C. VAN FLEET,

Judge.

Filed Feby. 13, 1913. [234]

---

[Title of Court and Cause.]

**Citation [on Appeal—Copy].**

To Portuguese-American Bank of San Francisco, a Corporation, Defendant; to Thomas F. Boyle, Defendant, Greeting:

WHEREAS, John Daniel, Trustee of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled controversy, and Paul I. Welles, complainant in said controversy, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from an Order or Decree lately, and on January 30th, 1913, rendered in the District Court of the United States for the Northern District of California, made in favor of said Portuguese-American Bank of San Francisco, a corporation, you are, therefore, hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be [235] holden at the City of San Francisco, in the said District, on the 10th day of March, 1913, to do and receive what may appertain to justice to be done in the premises.

WITNESS the Hon. WM. C. VAN FLEET, Judge of said District Court, this 10th day of February, in the year of our Lord Nineteen Hundred and Thirteen and of the Independence of the United



States of America the One Hundred and Thirty-seventh.

WM. C. VAN FLEET,  
Judge.

RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss

I hereby certify and return that I served the annexed Citation on the therein named Portuguese-American Bank of San Francisco, a Corpn., by handing to and leaving a Certified copy thereof with V. L. Figueiredo, Cashier of said Portuguese-American Bank of San Francisco, a Corpn., personally at San Francisco, in said District on the 11th day of February, A. D. 1913.

C. T. ELLIOTT,  
U. S Marshal.

By Elmo Warner,  
Office Deputy. [236]

RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Thomas F. Boyle by handing to and leaving a certified copy thereof with Thomas F. Boyle, personally, at San

Francisco, in said District, on the 11th day of February, 1913.

C. T. ELLIOTT,  
U. S Marshal.

By \_\_\_\_\_,  
Deputy.

Filed Feb. 10, 1913. [237]

---

[Title of Court and Cause.]

**Statement of Proceedings and Testimony.**

BE IT REMEMBERED that all of the testimony concerning the [238] alleged assignment of the fourth progress payment on the Fourth and Kentucky Streets contract of the Metropolis Construction Co., a corporation, in dispute in this case, taken or used on the hearing of this cause before the Referee, is as follows, to wit: [239]

**[Testimony of Thomas F. Boyle, for Complainant.]**

THOMAS F. BOYLE, being duly sworn as a witness on behalf of complainant, testified as follows:

**Direct Examination.**

My name is Thomas F. Boyle. I believe I am one of the defendants in this cause, and at present I am the Auditor for the City and County of San Francisco, State of California. I have occupied that office for more than a year last past. [240]

(Original demand for the fourth progress payment on the Fourth and Kentucky Streets job is read in evidence by counsel for complainant as follows:)

(Testimony of Thomas F. Boyle.)

(Written) "KENTUCKY STREET SEWER 1904."

(In red ink.)

(Printed)

PUBLIC BUILDING FUND SERIES 1904.

SEWER CONSTRUCTION ACCOUNT.

DEPARTMENT OF PUBLIC WORKS.

Auditor's No.

10922

\$6830.85

MATERIAL—LABOR.

Treasurer's No.

San Francisco Dec 5, 1910.

"Metropolis Construction Co. Presents this demand on the Treasury of the City and County of San Francisco, for the sum of Six Thousand eight hundred & Thirty 85/100 Dollars, Being for work done; material delivered as per bill attached."

(Attached to the demand, in the form of a bill, is the following:)

"San Francisco, Cal., Dec. 5, 1910.

City and County of S. F.

To Metropolis Construction Co., Inc., Dr.

ENGINEERS AND GENERAL CONTRACTORS.

Telephone Kearny 762

24 California St.

To fourth progressive payment Fourth and Kentucky 6830.85.

Prices and additions correct.

L. L. LEAVY.

Correct—L. E. HAUCK."

(Testimony of Thomas F. Boyle.)

(On the main body of the demand:)

“State of California,  
City and County of San Francisco,—ss.

L. F. Strong being first duly sworn, deposes and says: That he is a duly authorized agent of the party requested to perform the work mentioned in the foregoing demand; that the [241] work therein specified has been actually performed, and the material mentioned has been actually delivered, and the charges made are the proper and true values for the same.

Subscribed and sworn to before me this 5 day of Dec., A. D. 1910.

(Signed) L. F. STRONG.

(Signed) GEO. A. BERGER,

Asst. Clerk Board of Supervisors.

“The above demand is authorized by Chapters II, III and IV of the Charter of the City and County of San Francisco, approved by the Legislature, January 19, 1899, and by Ordinance No. 477, approved January 20, 1908, providing for the issuance, sale and redemption of bonds of the City and County of San Francisco, in accordance with the result of a Special Election held in the City and County, May 11, 1908, and by Resolution or Ordinance No. 1197 of the Board of Supervisors.

Allowed Jan. 5, 1911.

\_\_\_\_\_  
City and County Auditor.

By \_\_\_\_\_,  
Deputy.

(Testimony of Thomas F. Boyle.)

**"PUBLIC BUILDING FUND SERIES 1904.  
SEWER CONSTRUCTION ACCOUNT."**

(Endorsed:)

"Auditor's Receipt No 49123.

"I hereby certify that the labor mentioned in the within account has been actually performed; that the material has been actually received solely for the use of the City and County of San Francisco.

(Signed) **MARSDON MANSON. [242]**

By **HARRIS D. CONNICK."**

"Approved by Board of Public Works in open session.

**JOSEPH L. McCORMICK,**  
Secretary."

"Resolution No. 8122."

(Signed:) **"M. CASEY,  
W. A. NEWSOM,  
Commissioners."**

"Bookkeeper's No. 7981.

"Entered. (Signed:) **L. L. LEAVY.**

"Approved: (In red ink:) to print Dec. 5, 1910."

(Signed) **"ROBERT J. LOUGHREY.**

\_\_\_\_\_,  
Committee Board of Supervisors.

"Received payment \_\_\_\_\_."

(Also endorsed:)



(Testimony of Thomas F. Boyle.)

**SEWER CONSTRUCTION ACCOUNT.**

**PUBLIC BUILDING FUND 1904.**

Treasurer's No.

Auditor's No. \_\_\_\_\_

10922.

**KENTUCKY ST. SEWER.**

**DEPARTMENT OF PUBLIC WORKS CON-  
TRACT.**

**DEMAND ON THE TREASURY.**

By Metropolis Const. Co. Dec. 5, 1910, for \$6830.85.

"In Board of Supervisors" (Rubber stamp erased with pen: "Dec. 12, 1910.") (Rubber stamp not erased:) "Jan. 3, 1911."

Referred to Finance Committee.

Approved (Signed:) J. L. Herget, J. McLaughlin.

Approved by Board of Supervisors in open session (Rubber stamp, erased with pen: "Dec. 12, 1910." Rubber stamp not erased:) Jan. 3, 1911." "For (in red ink:) \$6830.85." [243]

(Signed): "John H. Ryan, Asst. Clerk." (Initials in red ink:) "C. W."

(Signed:) "W. R. Hagerty Clerk."

"Approved": (Rubber stamp scratched out with pencil: "Dec. 13 1910.") (Rubber stamp not scratched out:) "Jan. 4, 1911."

(Signed): "P. H. McCarthy, Mayor,"

"Clerk's No. 20840."

Mr. FROST.—Accompanying this is an estimate dated December 3, 1910, by the city engineer, being the fourth progressive estimate on the Fourth and Kentucky street contract, amounting to \$9,107.80, of

(Testimony of Thomas F. Boyle.)

which the demand in question is 75 per cent. There is a letter attached to it, but I do not offer the letter.

(Witness continuing:) I regard the letter as part of the demand.

Letter referred to read in evidence by counsel for defendant Portuguese-American Bank as follows:

"Fourth & Kentucky Street Sewer, Fourth Payment."

"December 3d, 1910.

"To the Honorable Board of Public Works of the City and County of San Francisco:

"Gentlemen:

"The following estimate of the value of the labor done and materials incorporated into the work since the last preceding estimate was made for the construction of sewers and appurtenances in Kentucky street and Fourth street has been made to the 1st day of December, 1910.

"This estimate is based upon the amount of work which has been completed in accordance with the plans and specifications and upon the whole amount of money that will become due according [244] to the terms of the contract when the whole of the proposed work shall have been completed.

"This contract was awarded on July 8th, 1910, to the Metropolis Construction Co. for the sum of \$33,182. The estimated value of the labor done and materials incorporated in the work since the last preceding estimate was made is \$9,107.80. Under the terms of contract, the contractor, the Metropolis Construction Co. is entitled to the payment of an amount

(Testimony of Thomas F. Boyle.)

equal to 75 per cent of the above estimate, or to \$6830.85.

"A summary of the value of the labor done and materials incorporated into the work since the contractor began the performance of his contract and the progress payments previously recommended follows:—

Total estimated value of work completed

December 1, 1910.....\$28,609.05

75 per cent of total estimated value..... 21,456.79

Total progress payments previously re-

commended..... 14,625.94

Balance due contractor..... 6,830.85

Respectfully submitted,

MARSDON MANSON,

City Engineer."

(Initialed) L. E. H/J." [245]

I have with me the original demand for the fourth progress payment on the Fourth and Kentucky Streets job. (Producing.) That is the paper that I have in my hand now. That is a demand for the fourth progress payment on the Fourth and Kentucky Street contract between the Metropolis Construction Company and the City and County of San Francisco.

I am familiar with the signatures that appear upon that demand and on the letter that has just been read. As Auditor of the City and County of San Francisco, I have seen the signatures of those persons many times. They are the signatures of the persons whose names are signed to the document, the

(Testimony of Thomas F. Boyle.)

Mayor and members of the Board of Supervisors and others. I received that document on January 5, 1911. It came to us from the Board of Supervisors and has been in my possession ever since, that is, I have had that paper ever since—I have had this demand ever since that day. Since that day there has been one other demand passed through my office as Auditor on this Fourth and Kentucky Streets contract. That was the fifth and final payment; I did not make a record of the amount. I could not say whether or not it was \$11,049.64; I have not got a memorandum of it; anyway, it was the fifth and final payment on this contract. That was after the contract was accepted. It came through the usual [246] way. It was passed by all these different members of the committees in the usual way, from the Board of Supervisors. That was after the contract was accepted in the usual course of business. John Daniel, as receiver and trustee of the Metropolis Construction Co. got the demand. At the time I gave that demand to Mr. Daniel, there were no claims against it—there were some but those who held them consented to release the demand and to turn the demand over to Mr. Daniel, the trustee. So far as the City is concerned, there are not any claims now against this demand—against the fourth progress payment. As far as the City is concerned, that is, the Board of Supervisors, the Board of Public Works and the Mayor, they are through with it. They have no further interest in the Fourth and Kentucky Streets contract that I know of, other than

(Testimony of Thomas F. Boyle.)

—that the Board of Supervisors usually, where there are protests against payments, they also notify the Auditor of those protests. Those come in the usual course of business. But there has been nothing of that kind on behalf of the City itself or any officer of the City; and I personally don't claim any interest in the demand, that is, this particular fourth progress payment now. I said that we made the fifth payment to John Daniel, Trustee. I am familiar with these bankruptcy proceedings, that is, I have been advised that Mr. Daniel is the trustee of the estate of the Metropolis Construction Co. I have paid money over to him in due progress of business. As a matter of fact, I have been directed by the City to pay the money over to whomever is entitled to it, and on its face that is the Metropolis Construction Co. I have acted merely in the position of stakeholder. If it had not been for the fact that I feared [247] that I might incur some responsibility myself if I paid this money over to John Daniel, Trustee, I would do so. That is the only reason why I don't do it. The Portuguese-American Bank has made claim upon me and I feel that if I turn that warrant over in accordance with the demand of the trustee of the estate of the bankrupt, I might possibly incur some personal liability to the Portuguese-American Bank—there are some claims against this demand and until it is all straightened out, I am going to hold it to protect myself.



**[Testimony of Chris Emille, for Defendant Portuguese-American Bank.]**

CHRIS EMILLE, being duly sworn, as a witness on behalf of defendant Portuguese-American Bank, testified as follows:

**Direct Testimony.**

On December 6, 1910, and for the year prior thereto, I was president and general manager of the Metropolis Construction Company. On December 5, 1910, I went to the Portuguese-American Bank of San Francisco to make a loan of \$30,000, and while there made the loan. On December 5, 1910, I brought the letter you (Counsel for Defendant Portuguese-American Bank) now hand me, addressed to Thomas F. Boyle, to the Portuguese-American Bank. When I got there, I think I first saw Mr. De Figueiredo. Then I tried to get \$30,000 on an assignment for money that we had due us from the City of \$30,000. I asked Mr. De Figueiredo to adopt the assignment of money of the Metropolis Construction Co. due with the City for work performed by the Metropolis Construction Company. We had this money coming to us from the City and we wanted to get that assignment to the Portuguese-American Bank so that we could use that money. I told Mr. De Figueiredo that we had so and so much money coming to us [248] from the City—\$38,000 either more or less—coming to the Metropolis Construction Co. for work performed for the City. At that time our Company was doing three jobs for the City—the Sunset, the Seventh Street, and the Fourth and

(Testimony of Chris Emille.)

Kentucky. We were putting in sewers. There was money due us on these particular jobs—around \$38,000. I know that on December 5, 1910, money was due the Metropolis Construction Company.

Counsel for defendant Portuguese-American Bank offered and read in evidence the letter or order addressed to Thomas F. Boyle that witness testified he brought to the Bank on December 5th, 1910. It is as follows:

“San Francisco, December 5, 1910.

“Thomas F. Boyle, Auditor of the City and County of San Francisco.

“Dear Sir: You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco is hereby authorized and empowered to draw the warrants in favor of the undersigned against the City and County for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

“First: Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5, 1910, for Kentucky and Fourth street sewers; the contract being between the undersigned and said City and County, new bond issue of 1903.

“Second: Warrant for the sum of \$12,173.17, being fourth progressive payment on account of contract between the undersigned and said City and County, and dated March 25, 1910, for lower Sunset District Sewer and being contract No. 36. [249]

(Testimony of Chris Emille.)

"Third: Warrant for the sum of \$19,167.20, being fourth progressive payment on account of contract between the undersigned and said City and County, and dated June 22, 1910, and being for the construction of sewer in Seventh street, Howard and Hubbell street under contract No. 31.

**METROPOLIS CONSTRUCTION CO., INC.**

By **CHRIS EMILLE,**  
President.

By **L. F. STRONG,**  
Asst. Secretary."

(Seal of the Metropolis Construction Co. attached.)

(Marked:) "Received Auditor's Office December 6, 1910. H. J. and L. F. Strong."

I signed that paper. I know that signature; it is Mr. Strong's. He is Assistant Secretary. The seal on it is the seal of the Metropolis Construction Co. I asked Mr. De Figueiredo to accept that assignment and let us have the money. I asked to borrow money from the Bank—\$30,000. Mr. De Figueiredo would not accept this except the Auditor accepted it, received it, you know, and that—I offered an assignment of that money that was coming to the Metropolis Construction Co. from the City according to these three resolutions. That paper I offered to turn over as security—that paper that I have just read to the court a few moments ago. At the time I offered that assignment as security, Mr. De Figueiredo told me to get that paper received by the Auditor; to go to the Auditor to get it stamped. Then I went to the Auditor's office and

(Testimony of Chris Emille.)

got this. He put this seal on it; he put this rubber stamp on it. I brought that paper back to the Bank—the same paper that the Auditor stamped—and turned it over to Mr. De Figueiredo and got that loan of \$30,000 on this assignment. Mr. [250] De Figueiredo is present here; there is the gentleman right there (indicating). I know that he has official connection with the Portuguese-American Bank of San Francisco. When I brought this assignment and gave it to Mr. De Figueiredo we got that amount of money, \$30,000.

(Counsel for defendant Portuguese-American Bank shows witness a paper—Note of the Metropolis Construction Co. to Portuguese-American Bank—purporting to be signed by J. A. Baptista, Secretary, and Chris Emille, President, and having the seal of the Metropolis Construction Co. attached.)

That is my signature. The other signature is Mr. Baptista's. The seal is the seal of the Metropolis Construction Co. On December 6, 1910, when I turned over that order of the Auditor that was just read in evidence, I gave Mr. De Figueiredo as further security, this note. Mr. Baptista was Acting Vice-President of our Company. I think he should put "Vice-President." He was not the Secretary of the Metropolis Construction Company; but he had the right to sign all checks and so forth.

Counsel for defendant Portuguese-American Bank offered and read in evidence the note identified by witness, of which the following is a copy:

(Testimony of Chris Emille.)

"San Francisco, Cal., December 6, 1910.

"No. S-122.

"\$30,000.

"On demand, at three o'clock p. m. of that day, no grace, for value received, in gold coin of the government of the United States, the Metropolis Construction Company, a corporation, promises to pay to the order of Portuguese-American Bank, at the Portuguese-American Bank of San Francisco, in this city, thirty thousand dollars, with interest from date at the rate of seven per cent per [251] annum until paid, payable *montly*. Both principal and interest payable in like gold coin.

"In testimony whereof the said corporation has caused its corporate name to be hereunto signed by its president, and its corporate seal to be hereunto affixed by its secretary, said president and secretary having been hereunto expressly and specifically directed by a resolution of the Board of Directors of said corporation, duly adopted by a majority of said board at a meeting of the said board duly called and held.

"METROPOLIS CONSTRUCTION CO., INC.

"By J. A. BAPTISTA,

"Secretary.

"By CHRIS EMILLE,

"President."

(Seal of the Metropolis Construction Co. attached.)

At the time I delivered the assignment that was read in evidence, I delivered to Mr. De Figueiredo those resolutions that are hereto attached and the note that was just read in evidence—the note for



(Testimony of Chris Emille.)

\$30,000. I gave these very papers to Mr. De Figueiredo at that time.

Counsel for defendant Portuguese-American Bank offered in evidence the resolutions referred to, which were received without objection and marked respectively as follows:

Defendant Portuguese-American Bank's Exhibit No. 1. Resolution adopted by the Board of Public Works, showing the allowance of \$6,830.85 as the fourth progress payment on the contract for the construction of sewers in Kentucky and Fourth streets in favor of the Metropolis Construction Co. [252]

Defendant Portuguese-American Bank's Exhibit No. 2. Resolution adopted by the Board of Public Works, showing the allowance of \$19,167.20 to the Metropolis Construction Co. for sewers in Seventh Street.

Defendant Portuguese-American Bank's Exhibit No. 3. Resolution adopted by the Board of Public Works, showing the allowance of \$12,173.17 to the Metropolis Construction Co. for sewers in Lower Sunset District.

CHRIS EMILLE, recalled as witness for defendant Portuguese-American Bank, being duly sworn, testified as follows:

On or about December 7th—that is the day after I testified I was at the Portuguese-American Bank and turned over the assignment to the Bank as security for a loan of \$30,000. I called at the Bank again. On that day I borrowed \$5,000 more on the same assignment. I saw Mr. De Figueiredo and asked

(Testimony of Chris Emille.)

him to have the Bank give me \$5,000 more on the same assignment. He told me to go and see the president of the bank. Then I went in there to see the president of the Bank, and asked him the same question—to have the bank give me \$5,000 more on the same assignment. He first found a little objection to it, and afterward I got it. He allowed me \$5,000 more on the same assignment. Then a note was presented for me to sign.

(Counsel for defendant Portuguese-American Bank shows witness a note for \$5,000, dated December 7, 1910.)

That is the note that was presented to me to sign. I signed that note. This is my signature. The seal is the seal of the Metropolis Construction Co.

Note identified by witness read in evidence by counsel for [253] defendant bank, as follows:

"\$5,000. San Francisco, Cal., December 7, 1910.

"On demand, at 3 o'clock P. M. of that day, no grace, for value received, in gold coin of the government of the United States, Metropolis Construction Company, a corporation, promises to pay to the order of the Portuguese-American Bank, at the Portuguese-American Bank of San Francisco, in this city, Five Thousand and 00/100 Dollars, with interest from date at the rate of seven per cent per annum until paid, payable monthly. Both principal and interest payable in like gold coin.

"In testimony whereof, the said corporation has caused its corporate name to be hereunto signed by its president, and its corporate seal to be hereunto

(Testimony of Chris Emille.)

affixed by its secretary, said president and secretary having been hereunto expressly and specifically directed by resolution of the Board of Directors of the said corporation, duly adopted by a majority of the said Board, at a meeting of the said Board duly called and held.

(Signed) "METROPOLIS CONSTRUCTION  
CO.

"By J. A. BAPTISTA,

"Asst. Treas.

"By CHRIS EMILLE,

"President."

(Seal of the Metropolis Construction Co. attached.)

The Metropolis Construction Co. gave as security for this note or with this note the same assignment as the \$38,000 held by the City Treasurer. That is the same \$38,000 held by the City Treasurer, the Auditor. That was the \$38,000 that had been assigned to the Bank before. I've been told that none of those loans has been repaid by the Metropolis Construction Co. I believe they have not been paid—I know they have not been paid. The Metropolis Construction Co. had one contract with the City and County of San Francisco for the construction of sewers on [254] Kentucky and Fourth Streets. This is the assignment (indicating) that was read in evidence. The contract that is mentioned in this is the only contract that we had with the City for the construction of sewers on Fourth and Kentucky Streets. This is referring to a paper I call an assignment which was read in evidence. At the time I

(Testimony of Chris Emille.)

turned it over to the Bank my understanding as to its nature was that it was an assignment for them to draw the money from the City Treasury.

**[Testimony of L. F. Strong, for Defendant.]**

L. F. STRONG, recalled as a witness on behalf of defendant Portuguese-American Bank of San Francisco, a corporation, being duly sworn, testified as follows:

**Direct Examination.**

I called at the Portuguese-American Bank of San Francisco on December 6, 1910—I believe that was the date. I went in with Mr. Emille and I saw Mr. De Figueiredo, and I stayed outside of the counter. Mr. De Figueiredo was inside the enclosure there. I believe at the receiving window. Mr. Emille was carrying on a conversation with him; then Mr. Emille went inside with Mr. Freitas. Mr. Emille was carrying on the conversation with Mr. De Figueiredo in my presence. I forget the exact words of the conversation but Mr. Emille was asking for an additional loan of \$5,000 on that assignment—the assignments of the City vouchers, amounting to \$38,000. I believe I was at the Bank once before this when they were arranging the details of making the assignments to the bank. I don't recollect exactly what was said on that day because I don't believe I heard the conversation. It was just merely arranging for the details of having those assignments made—the same assignments that they had before. I [255] didn't hear the conversation.

(Counsel for defendant Portuguese-American

(Testimony of L. F. Strong.)

Bank shows witness the letter addressed to Thomas F. Boyle, Auditor of the City and County of San Francisco, which Mr. Emille testified he left with the Portuguese-American Bank, already read in evidence.)

The signature now shown me is my signature. I saw that on the date it bears, December 6th, 1910. I took it to the Auditor's office on December 6th. The seal shown me is the seal of the Metropolis Construction Co. The signature now shown me is the signature of Chris Emille, President of the Metropolis Construction Co. I believe Mr. Baptista came and took the paper to the Portuguese-American Bank. When we were at the Auditor's office, we filed one of these assignments, and had the Auditor stamp the other one as received. I was present with Mr. Emille when a loan of \$30,000 was asked of the Portuguese-American Bank by the Metropolis Construction Co.—at one of the times when he was arranging to make these assignments. I believe I was present both times when loans were requested. I don't believe the sum was \$30,000. I was with the Portuguese-American Bank in relation to the assignment of the particular warrants mentioned in that assignment. At that particular time, \$30,000 was requested. Mr. Emille asked the officials of the Portuguese-American Bank for this loan. It was asked at the time I was there. I don't believe that I heard the conversation, but I knew that that was what he was applying for at that time. I knew he was applying for it at that time because I had arranged the



(Testimony of L. F. Strong.)

details before that, as to the amount we were going to borrow. I heard conversations between Mr. De Figueiredo and Mr. Emille. Mr. Emille asked Mr. De Figueiredo for a further loan of \$5,000 on the assignments that he had already borrowed \$30,000 on. I [256] know that the loan of \$5,000 was made on the occasion that I have just mentioned. I know that the Metropolis Construction Co. gave a note to the Portuguese-American Bank for the sum of \$5,000 on that occasion. I saw Mr. Emille sign the note that was given.

(Counsel for defendant Portuguese-American Bank shows witness a note.)

I believe the note shown me is the note to which I refer. That signature shown me is Mr. Baptista's. I believe he is the Assistant Treasurer and Vice-President of the Metropolis Construction Co. The signature now shown me is Chris Emille's. The signature now shown me is the signature of the Metropolis Construction Co. The loan was made at the time that note was dated. I know that a resolution was passed by the Metropolis Construction Co. about January of 1910, empowering Mr. Emille to take full and exclusive charge and management of the affairs of the Metropolis Construction Co., and also giving him power to borrow money, and appointing him general manager. I was present at the meeting at which that resolution was passed. At that meeting, I was acting in the capacity of assistant secretary. At that time and subsequently during the year 1910 I was doing the duties of secretary of the Me-

(Testimony of L. F. Strong.)

Metropolis Construction Co. Mrs. Emille, the regular secretary, was not active during the year 1910 as secretary of the Company. I performed the actual duties of secretary of the Metropolis Construction Co. subsequent to **January 1, 1910, and during the year 1910.** I know that about the time of that meeting, a resolution prepared by Mr. Cochran, the attorney for the Company, was read or was introduced at the meeting that [257] I have just testified to. I do not know where that resolution is now. I do not know where the minute-book of the Metropolis Construction Co. is. I read the original resolution.

**Cross-examination.**

I acted as secretary of the Company. Mrs. Emille did not do the active duties of secretary. I don't believe I ever saw an actual minute-book of the corporation. I don't recollect of ever having seen the minute-book of that corporation. I saw the resolution I mentioned at the meeting. I believe I had it and Mr. Emille had it. It was typewritten on white paper. I believe it was filed away. Those different resolutions were kept at different places at different times. I don't know the exact location where this was filed. It was filed with the rest of the papers in Mr. Emille's desk, I think. I read it over myself. I have seen it since—the original resolution. I had several copies drawn at different times for different people's information. I did not make them myself—I ordered them made. I saw the original and read it over.

(Testimony of L. F. Strong.)

Redirect Examination.

The substance of the resolution was that Mr. Emille was appointed general manager of the Metropolis Construction Co., to bind it in any form that he might see fit; to borrow money, to make contracts; he was in the sole charge of all employees. That was according to that resolution under the action of the general manager; he was to have full power in regard to employees. My recollection is pretty good [258] about that. I had it come up several times, and I don't need to have it refreshed in any way. I could not say that all the wording is exactly the same, but the paper now shown me is a similar copy to the copy of the resolution that was adopted at the meeting I just referred to. It is substantially what was in that resolution. The resolution that I adopted was the same resolution that was received from Mr. Cochran about that time. I should judge it would be the secretary's duties to keep the minutes of the corporation. I do not know of the secretary, Mrs. Emmille, ever keeping any minutes of the corporation. I don't know of her ever taking any active interest in the duties of her office as secretary; as director, yes. Mr. Emille handled the resolutions that were adopted at the meetings. Resolutions were generally drawn up by Mr. Cochran, our attorney. I never saw Mr. Cochran write up any of the resolutions in any book kept by the corporation for the purpose of entering any minutes of the Board of Directors. At the time the meeting would be held, there would be

(Testimony of L. F. Strong.)

some notations or papers drawn up and filed away. I believe they were filed in a folder. Mr. Emille kept them. As far as I know, that is what the minutes consisted of, the folder. I did not attend all the meetings. At the meetings I attended, I made some notes. I gave them to Mr. Emille. He kept those together in his own desk. The directors at the time of this meeting were Mr. Chris. Emille, Mr. Alfred Reinicke and Mrs Chris Emille. Mr. Emille and Mr. Reinicke and I were present at this meeting when this resolution was adopted. [259]

Recross-examination.

Mr. Baptista's office was Vice-President and Assistant Treasurer. He had no other office to my knowledge. I held the office of Assistant Secretary all the time from about January, 1910, to about January, 1911, and exercised the duties of it all that time. Mr. Baptista was drawing checks and checking the accounts—all payable accounts of the Metropolis Construction Co. as to whether they were correct or not. He was there to take charge of the bookkeeping and for making the pay-rolls, and to see that the business went along in correct form; as a matter of fact, to see whether it was correctly done. I don't know what became of the folder in which these papers or notations of the minutes were kept. Some of the notations were typewriting and some of them were pencil, I suppose, or ink; various. As a matter of fact, the minutes of the meetings or of any one meeting might consist of several different papers. We drew up at several of the meetings

(Testimony of L. F. Strong.)

several resolutions tending along the lines of buying materials that were important.

**Redirect Examination.**

The duties of the different officers were not very clearly defined in that corporation. The resolution that I say was adopted was never revoked or cancelled. I believe there were by-laws before my time; I don't believe I ever read them; I think I did see them once.

Counsel for defendant Bank offered and there was admitted in evidence and marked "Defendant Portuguese-American Bank's Exhibit No. 4," a copy of a resolution passed by the directors of the Metropolis Construction Company in January, 1910, conferring [260] upon Chris Emille, the president of the company, the powers of General Manager of the Company with full and exclusive charge of the management and conduct of the affairs of the Company with full power to borrow money and to do and perform such things as may be necessary from time to time to carry on and conduct the affairs of the Company.

**[Testimony of M. T. Freitas, for Defendant.]**

M. T. FREITAS, recalled as a witness on behalf of Portuguese-American Bank of San Francisco, corporation, defendant, being duly sworn, testified as follows:

**Direct Examination.**

My name is M. T. Freitas. I live at San Rafael. My nationality is Portuguese. I was born in St. George Island, one of the Azores Islands. I was



(Testimony of M. T. Freitas.)

President of the Portuguese-American Bank of San Francisco during the year 1910. I was President of the Bank on December 5th and 6th when Mr. Emille came down there to see me about that time. I saw Mr. Emille on December 5th, 1910, at the office of the Bank in this City and County. Mr. Emille came in to see Mr. De Figueiredo, our cashier, to negotiate a loan. He wanted to negotiate a loan of \$30,000, and I asked him what collateral he had to put up for that loan. He then showed me an order on the Auditor for \$38,000 and the notice only being written out, and I told him I didn't think it was in proper condition to go through; that he ought to take it before the Auditor and have him acknowledge receipt before he could make the assignment. Then he said that he would go up and have it properly attended to.

(Counsel for defendant Portuguese-American Bank shows witness paper already introduced in evidence, being letter addressed to Thomas F. Boyle, Auditor of the City and County of San Francisco, which Mr. Emille testified he left with the Portuguese- [261] American Bank.)

That is the paper that Mr. Emille brought to me on that occasion in order to assign his collateral. This stamp or this receiving part of it was not on at the time—this Auditor's receipt; that stamp. I wanted him to get a proper notice given to the Auditor before I took the assignment and loaned the \$30,000—let the \$30,000 go. He called on me later, but I don't recollect whether exactly the same

(Testimony of M. T. Freitas.)

day or the next day. I would not say positively; but when he saw me the next time he presented the document as it is now and I had Mr. De Figueiredo, the cashier, have him sign the note for the corporation—have the corporation give a note for the \$30,000 and take care of the assignment for that amount, for \$38,000. He offered this paper, said he was going to make an assignment of this. He said that the Company required \$30,000 and that they offered this document, this notice from the Board of Public Works for \$38,000, as security for \$30,000 and the Company to make an assignment for that amount. Mr. Emille presented those papers to me at that same time—the papers introduced in evidence as defendant Portuguese-American Bank's Exhibits 1, 2 and 3. The loan of \$30,000 and the presentation of these papers to me took place at the same time. They were one transaction. I saw the note that was given on that occasion. The note that has just been introduced in evidence is the note that was given on that occasion,—at the same time, before the money was delivered. I saw Mr. Emille on December 7th at the Bank. On that occasion he wanted \$5,000 more on that same assignment that he had made the day previous, because he needed money to pay the labor, and [262] it would be quite an accommodation to the Metropolis Construction Co. to let him have \$5,000 as he wanted to pay off the labor. Regarding security, he said that we had that security of \$38,000, and there was only \$30,000 that we had allowed on that assignment.

(Testimony of M. T. Freitas.)

of \$38,000. Then I told Mr. De Figueiredo to let him have the sum of \$5,000 on that same assignment, and take a new note, a second note. I have seen that note lots of times. That note of \$5,000 dated December 7, which was read in evidence is the note that was given to me on that occasion—given to the Bank—to the cashier. About December 9th or 10th I requested you (referring to James B. Feehan, counsel for defendant Bank) to represent the Bank in reference to the Bank's notes against the Metropolis Construction Co. and this assignment—to take charge of the legal part of the collection of those notes. I authorized you to do everything that was necessary. You were attorney for the Bank and were to take full charge of those notes and have them paid in to the Bank. You were our attorney during all the year 1910. At the time that these notes were taken, I, as President of the Bank, had received no notice that the Metropolis Construction Co. was involved in any way, or that its credit was impaired and that insolvency or receivership proceedings were contemplated by it or against it—at that time. I had no reason to believe that this assignment would create a preference in favor of this Bank. At that time there was no money due to the Bank. I think this Company had been doing business with the Bank about three or four years. They did a very large business with us; they used to borrow quite often and put up collateral. These two loans of \$30,000 and \$5,000 on December 6th and 7th, 1910, were made in the usual course of [263]

(Testimony of M. T. Freitas.)

the Bank's business. I thought that the reputation of the Metropolis Construction Co., as to its financial condition, on December 6th and December 7th, was A-1. At all times subsequent to December 6th, I have claimed to be the owner and entitled, as president of the Bank, to the possession of the warrant mentioned in that assignment.

Cross-examination.

I think that we have been lending them money for four years, I won't say positively; about that—three or four years. I don't know if it is the same corporation; it used to be a partnership, I think, I am not positive. Mr. Emille was interested and someone else, I have forgotten. That is away back about 1906. That was the time of the earthquake. We made loans right along for two years previous to December 10th. This was the second assignment that we had had. We had had one about a month previous of about \$20,000. I am not positive as to the amount. I know we had the same kind of an assignment. As collateral, they would put up bonds, commercial bonds and other bonds—different kinds of collateral. I am not positive whether or not they gave an assignment by resolution. Our cashier made it. I think about a month or so previous to that, that we had an assignment of \$20,000. But we always had a notice of resolution authorizing the Board of Directors or Mr. Emille to borrow money from the Bank, or else he would not have got it. The copy of that notice was shown to us. I am not positive if we got it now or not. I know I saw it.

(Testimony of M. T. Freitas.)

I don't know as I looked for it. My attorney did not ask me to look for it. We loaned the corporation \$5,000, on, I think, December 7th; I am almost sure it was December 7th; [264] it is a good many months ago. I could not tell you whether or not it was on December 10th, Saturday, three days afterwards, that this corporation went into the State Court and confessed its insolvency. I heard somebody—I could not tell whether it was December 10th or 20th. I remember that it was done; I would not say the date. I knew the date, but I could not tell what date it was. I don't know whether or not I knew it on that date. I was sick in bed. I fell sick in December. I was taken sick, I think, about the 9th or 10th of December. The meeting of the Board of Directors of the Portuguese-American Bank is on the second Saturday of each month. I was there; that was the last time I was there; I was sick for quite a while. I don't know whether or not I knew about it on that day. I did not become anxious about the condition of the Metropolis Construction Co. before that nor immediately after we made that last loan of \$5,000. I never became anxious about it because I considered them A-1 and had no reason to question their solvency at that time. I authorized Mr. Feehan (counsel for the Portuguese-American Bank) to prosecute our claims and to collect the notes when they were due. It could not be on the 9th; on the 9th I didn't know anything about it. It was not on the 10th—the day of the meeting of the Board of Directors that I attended;



(Testimony of M. T. Freitas.)

I don't know what date it was. I did not show him the resolutions passed by the Board of Public Works at the time we let him have this last \$5,000. That was away back. But this resolution of the Board of Public Works; this was on the 6th. That was before he got the \$30,000. He got the \$30,000 on either the 6th or 7th; I could not [265] say positively. At the time he got the money and showed me these resolutions from the Board of Public Works that I have testified to. They were to be paid on the 13th, I believe. I think it was something like that; because the Board of Supervisors would meet on the following Monday. But I had the assignment and we were protected to the extent of our interest. I could not tell you positively whether or not it was the 13th that they were to be paid on; it is so far back; I could not tell you the date. I could not tell exactly when I gave Mr. Feehan his authority; I can't remember.

**Redirect Examination.**

After the meeting of the directors on December 10th, I remember meeting Mr. Feehan in front of the vault of the Bank and saying something to him about this case—about the testimony taken, but I could not remember now what Mr. Feehan said. I know I was not feeling well and I had to go home, and I think Mr. De Figueiredo was going to place the matters with Mr. Feehan, because as soon as I got through the meeting I had to go home; but I spoke to Mr. Feehan for just a short while. I remember that it was a day at the bank, and I was not feeling very

(Testimony of M. T. Freitas.)

well, and I told Mr. Feehan to see Mr. De Figueiredo. He was the cashier and had the proper authority to instruct Mr. Feehan what to do. I was not in a condition to transact business when I got through with that meeting. I don't know whether or not it was on that day that I was notified that the Metropolis Construction Co. was in difficulties; I don't remember exactly. My condition was so that I had to resign the management of the Bank, because I was very nervous, and have been for years, and I [266] resigned the management of the Bank on that account. I was not competent to take full charge of the management. I think I notified Mr. Feehan that I saw the resolution of the Metropolis Construction Co. authorizing Mr. Emille to borrow money, but I am not positive. I don't know if such resolutions are in the files of the Bank; I don't think they are.

[Testimony of V. L. De Figueiredo, for Defendant.]

V. L. DE FIGUEIREDO, being duly sworn as a witness on behalf of defendant Portuguese-American Bank, a corporation, testified as follows:

**Direct Examination**

I reside in this City and County. I was born in Portugal. I was cashier and secretary of the Portuguese-American Bank during the year 1910, including December 5th, 6th and 7th, 1910, and have held those offices at all times since then. I hold them now. I know Messrs. Emille and Strong, who appeared here, as officers of the Metropolis Construction Co. I saw Mr. Chris Emille and Mr. Strong on December 5th, 1910. They came up to the Bank to bor-

(Testimony of V. L. De Figueiredo.)

row \$30,000 and offered as security an order on the treasurer of the City and County of San Francisco for warrants amounting to \$38,100.16, or about that. I took the matter up with the president that day, and this assignment that was given—that they were offering to us—had not been accepted by the Auditor, so that I told them to have the Auditor accept it first, before we would deliver this money. On the following day then they came in with the order already accepted by the Auditor and we gave them the \$30,000, and got their note for it. [267]

(Counsel for defendant Portuguese-American Bank shows witness an order on the Auditor, dated December 5, 1910.)

I have seen that before; I saw it on December 5th and December 6th. I saw it at the Bank. Mr. Emille brought it in. That is the order that I said I wanted to have accepted by the Auditor, so it would be some sort of collateral for the note—for the \$30,000. Otherwise, without this acceptance, we would not consider it as collateral. There were other papers shown me about that time. There was a copy of the resolutions, of three resolutions passed by the Board of Public Works. Those are the resolutions that have already been introduced in evidence. They were attached to this assignment when it was delivered to the Bank on December 6th. Mr. Emille stated that this paper—the order on the Auditor—was a complete assignment of the full amount of the three warrants—the warrants that are described in those resolutions, that is, the moneys

(Testimony of V. L. De Figueiredo.)

due on them are described in those resolutions.

(The *assignment and not* referred to have been already read in evidence. The resolutions are marked "Defendant Portuguese-American Bank Exhibits 1, 2 and 3.")

At that time, I took a note for \$30,000 from the Metropolis Construction Co. The note now shown me, of \$30,000, dated December 6th, is the note. This note was given to me at the time this assignment and the resolutions were given—on the second day—on the 6th. They are all under one transaction; in fact, they were all held together at the Bank. This was held for collateral for that note. When I received these papers, I just pinned them together to the note. I gave the Metropolis Construction Co. a credit [268] for \$30,000 right after they signed the note.

(Counsel for defendant Portuguese-American Bank shows witness a deposit tag showing a deposit in the Portuguese-American Bank of San Francisco, on December 6th, 1910, by the Metropolis Construction Co., of \$30,000.)

I saw the tag before; I saw it on the 6th of December, 1910. I made it out myself. The tag was made out at the time I received those papers from the Metropolis Construction Co.—right after the note was signed. This \$30,000 that was placed to the credit of the Metropolis Construction Co. was all paid out in different checks. They were paid on the 6th and on the 7th—part were paid on the 7th. They were all used by the Metropolis Construction Co. On December 7th I saw Mr. Emille again. He came into

(Testimony of V. L. De Figueiredo.)

the Bank on December 7th, having used all this money, and he asked for a further credit of \$5,000, stating that as we had a warrant for \$38,000, we were sufficiently warranted to give them \$5,000 more. So I took the matter up with the President of the Bank and we gave them a credit of \$5,000 more, on the 7th of December, 1910, upon their signing another note for that amount, and using the same order on the Auditor, and the collateral for this extra \$5,000.

(Counsel for defendant Portuguese-American Bank shows witness a note for \$5,000, dated December 7, 1910.)

That is the note. I received it on December 7th—a note signed by Mr. Emille. In fact, I wrote the note out myself and he signed it.

(The note, signed by the Metropolis Construction Co. by J. A. Baptista, assistant treasurer, by Chris Emille, [289] President, with the corporate seal of the Metropolis Construction Co., has already been read in evidence.)

(Counsel for defendant Portuguese-American Bank shows witness a deposit tag, showing a deposit in the Portuguese-American Bank on December 7th, 1910, by the Metropolis Construction Co., of \$5,000.)

That was made out by the receiving teller, Mr. Joseph. The \$5,000 that I loaned the Metropolis Construction Co. was also paid out on checks. It was placed to their credit. This shows that it was placed to their credit. That was all drawn out by checks by the Metropolis Construction Company.



(Testimony of V. L. De Figueiredo.)

To the best of my recollection, the Metropolis Construction Company, as a corporation, had been doing business with our Bank since November, 1908—November or December of 1908. I am not positive. I could tell by a memorandum here. (After referring.) —1908. I could not tell right off what was the volume of business during the year 1910, of the Metropolis Construction Co. with our Bank. I have got some memorandums that I could tell from. Well, they varied from one month to another. Some months they were doing \$50,000 of business and some months over \$100,000. I have a memorandum here showing just how much they were doing each month. In the month of August, 1910, they deposited with us \$40,250; in the month of September, 1910, \$27,-218.88; in the month of October, \$68,424.40; in the month of November, \$184,650.34. In the seven days of December, \$55,729.40. That is actual figures taken from the record. No part of the \$35,000 that was loaned on this assignment on December 6 and December 7 was ever repaid. There is now due from the Metropolis Construction Co. to the Portuguese-American [270] Bank \$35,000, plus interest, which amounts up to date to \$1,714 interest. There was a slight balance to the credit of the Metropolis Construction Co.—\$1.06. The Bank claimed to be the owner of these warrants and the money represented thereby at all times subsequent to December 6, 1910. On December 6th and also on December 7th we had no knowledge or information or belief whatever that the Metropolis Construction Co. was not a

(Testimony of V. L. De Figueiredo.)

solvent corporation. I had no reason to believe that this assignment would effect a preference in favor of our Bank as against other creditors. I know the reputation of the Metropolis Construction Co. financially, on the 6th of December; it was good. I was present at a meeting between Mr. Freitas and Mr. Feehan; but I don't recollect whether or not it was on December 9th. I was present at the time that we took that matter up, when we found out by the newspapers that the Company was in trouble. To the best of my recollection, that was on Saturday when I found it out, which was on the 9th, I think. I requested you to take action with regard to this matter. I don't know whether or not Mr. Freitas did, but I know I requested you. I requested you to do all that was for the interest of the Bank, all that was necessary for the interest of the Bank, to collect those notes. With regard to the assignment, I requested you to advise the auditor, and I don't remember who else, but the Board of Supervisors, I think, and the Board of Public Works, that we were the owners of such warrants. The only information I got at that time was the Metropolis Construction Co. was in trouble was received from the newspapers, on the 9th. Those loans were made in the regular [271] course of business at our Bank. These notes that were used are on the regular forms that we have at the Bank. Mr. Joseph Baptista left the employ of the Portuguese-American Bank on the last day of October, 1910. After that date, he had no official position or employment whatever with the Portu-

(Testimony of V. L. De Figueiredo.)

guese Bank. He never received any pay from the Bank after that. Mr. Baptista presented his resignation to the Board of Directors at the meeting of September 10. The resignation was accepted at that very meeting. I heard Mr. Freitas testify that he saw a resolution of the Metropolis Construction Co. in relation to Mr. Emille. There is no such resolution at the bank. We have no such resolution on file. If such a resolution were on file, it would be in my possession. There is no such resolution at the bank. I never heard until to-day that Mr. Freitas saw such a resolution.

Cross-examination.

When Mr. Emille came there on December 5th, Mr. Strong was right there with Mr. Emille. Mr. Emille did all the talking with me, and as I have related, there was talk about a loan of \$30,000 and the collateral for it. I wanted the collateral—this order on the City Auditor which has been introduced in evidence and which I have identified—accepted by the Auditor before I regarded it as sufficient upon which to make them a loan. And Mr. Emille in some way he got this stamp on from the Auditor's office—"Received Auditor's Office December 6, 1910"—and brought it back to me, and thereupon they gave us a note for \$30,000. I had some talk with the president of the bank about that—just us three—Mr. Emille, and the president [272] and myself. We had made previous loans under similar circumstances. On the 16th of November, we made a loan in the same manner. I had talked with nobody about

(Testimony of V. L. De Figueiredo.)

that first loan and the kind of security we were to receive except with the president and Mr. Emille. The president, Mr. Emille and I, on behalf of the company, arranged the loan.

I have lived in San Francisco about nineteen years. I am a citizen of the United States and of San Francisco, and a voter here. I am familiar with the manner in which the government of the City is carried on. At the time we loaned the money on those warrants, I thought they had been passed upon on that Monday, on the 5th, by the Board of Supervisors. I knew that the resolutions that were handed me were of the Board of Public Works, but I thought they were approved that day by the Supervisors. I did not make any investigation to find out until afterward, I guess. As a matter of fact, I don't think the approval of the supervisors is necessary. I knew that the warrant had to be approved by the Board of Supervisors before it could be paid. I hadn't had any trouble before that. We had got our money before that and had had no trouble. I anticipated that this thing would go right through; as a matter of fact, it was on its way then; that was my idea. I had no other paper on this particular loan from the Metropolis Construction Co. outside of the note and this assignment; I consider the resolutions and the assignment all one. I thought that was all one transaction. They were all pinned together. With regard to this loan, no one connected with the Metropolis Construction Co. had any dealings with anybody in the Bank except myself and the president, Mr.

(Testimony of John B. Lewis.)

Freitas. I don't [273] remember any more of the case.

**[Testimony of John B. Lewis, for Complainant.]**

JOHN B. LEWIS, being duly sworn as a witness on behalf of complainant, testified as follows:

**Direct Examination.**

I am Deputy in the Auditor's office of the City and County of San Francisco. I have occupied that position for about six years. As such Deputy Auditor, I am familiar with the general routine of the office. As to the general course of procedure with reference to demands or warrants after they arrive at the Auditor's office, up to the time they get back again from the Treasurer, they are placed within the proper book; they are registered and they are audited, if there is no objection to them, and passed out to the party who is entitled to the warrant. It goes to the treasurer's office and is paid there. There the warrant is marked "paid" and is cancelled; marked with a cancellation stamp over it. The person writes his name in the "received payment" place; then it is returned to the Auditor's office, stamped "paid" on the books, on the register, and then it is placed on file, in the filing case.

(Counsel for complainant shows witness three demands, all in favor of the Metropolis Construction Co.; the first, for \$8,400.69, being third payment on sewer contract No. 31 for the Seventh Street sewer; the second for \$6,964.13, for the payment on account of the Fourth and Kentucky Street sewer; and the



(Testimony of John B. Lewis.)-

third for \$10,864.57, being for the third payment on contract No. 36, for the Lower Sunset sewer.)

Those demands were paid November 22, 1910, that is, the first demand—the Seventh Street sewer. That bears a receipt [274] for the money; I see a name there, evidently L. F. Strong. I am not familiar with the signature of L. F. Strong. It is evidently, however, the same signature as appears on the face of the demand. I should think it was the same signature.

**Cross-examination.**

I was not in the Treasurer's office when these demands were paid; I don't know who received the money on these warrants.

**[Testimony of V. L. De Figueiredo, for Defendant  
(Recalled).]**

V. L. DE FIGUEIREDO, recalled as a witness on behalf of Portuguese-American Bank, defendant, being duly sworn, testified as follows:

During the month of November, 1910, our Bank made a loan of about \$20,000 to the Metropolis Construction Co. and took, as security, an assignment of certain moneys due the Metropolis Construction Co. from the City and County of San Francisco for the third progress payments on certain contracts then being carried out by the Metropolis Construction Co., for the City and County of San Francisco. We received the repayment of the amount of that loan on the 22d day of November, 1910, the amount of \$45,526.14, being the amount of the warrants for that particular payment. As to the amounts of the war-

(Testimony of V. L. De Figueiredo.)

warrants that were assigned to the Bank as security for the loan I have just testified to, I don't remember the amount of each warrant, but the total aggregates \$45,526.14. I don't remember the amount of the warrants that were assigned to the bank.

(Counsel for defendant Portuguese-American Bank shows witness a paper showing supposed amount.) [275]

That refreshes my mind; that is right.

(Counsel for defendant Portuguese-American Bank introduces in evidence an order on Thomas F. Boyle, the Auditor of the City and County of San Francisco, dated November 19, 1910, marked "Received at the Auditor's office November 15, 1910"; marked "Portuguese-American Bank Exhibit No. 6.")

That order on the Auditor shows the authority of the Portuguese-American Bank to take warrants aggregating about \$29,000. I received that money. That money was a part of the \$45,000 that I testified I received. I went to the auditor's office and made a demand for the warrants, stating that I was the cashier of the Portuguese-American Bank. The auditor didn't know me, and I had some one from the Treasurer's office to identify me. I don't remember who it was, if it was Mr. McDonald himself or someone else in the office; I don't remember just who it was. But I was identified before the auditor and he turned the warrants to me. Mr. Chris Emille and Mr. Strong were with me at the time. Then I took the warrants to the Treasurer and got the

(Testimony of V. L. De Figueiredo.)

money. That money was the whole amount, \$45,-526.14. That includes other warrants also. Mr. Strong signed the warrants at my suggestion and receipted for them at my suggestion. The warrants were made out in the name of the Metropolis Construction Co.; and the auditor, the only thing that he had was an order to deliver those orders to us, although our name didn't appear on the warrants, only on the order; therefore Mr. Strong signed them. I received the money and not Mr. Strong. I deposited the money with the Crocker National Bank for the account of our bank, on the very same date, on the 22d. [276]

**Cross-examination.**

I said the warrants were made out in the name of the Metropolis Construction Co. Mr. Strong was assistant secretary of that Company, and the other gentleman who was with me, Mr. Emille, was president of the company. What I had was this paper that we introduced here. That was the paper that was filed, an order to get the warrants. We all went there and took the money and Mr. Strong, at my suggestion, wrote on the back of the warrants, so that the warrants would not be changed. The paper didn't give me any authority at all, for changing the warrants. The paper gave me authority to receive the money. The paper itself, the demands, were made out in the name of the Metropolis Construction Co.

**Redirect Examination.**

As to how Mr. Strong happened to be with me that

(Testimony of V. L. De Figueiredo.)

day, Mr. Strong and Mr. Emille came up to the bank in an automobile, because, the amount being a large amount, I could not carry that in my hand; so they came up in an automobile and asked me if they could be of any service to me to carry the money for us; and that is why they went up.

**[Testimony of James B. Feehan, for Defendant  
(Recalled).]**

JAMES B. FEEHAN, recalled as a witness for Portuguese-American Bank of San Francisco, being duly sworn testified as follows:

On December 17, 1910, I filed with the Board of Supervisors of this City and County a letter, a copy of which I now offer in evidence.

(Copy of letter dated December 17, 1910, addressed to the Board of Public Works and to the Board of Supervisors of the City and County of San Francisco was introduced in evidence and marked "Defendant Portuguese-American Bank's Exhibit No. 5.") [277]

On December 19, 1910, between the hours of 9:30 and 10 o'clock in the morning, I left another copy of that letter with the Secretary of the Board of Public Works, to be given to said Board. On December 19, 1910, about 9 o'clock in the morning, I left another copy of that letter with the auditor of this City and County. On January 4, 1911, I left another copy with the Treasurer of this City and County.

**[Testimony of J. L. McCormick, for Complainant.]**

J. L. McCORMICK, called as a witness on behalf of complainant, being duly sworn, testified as follows:

I am the Secretary of the Board of Public Works of San Francisco.

The witness produces the contract described in the bill of complaint between the Metropolis Construction Company and the Board of Public Works of San Francisco for the construction of sewers in Fourth and Kentucky Streets, which was admitted in evidence.

The following from the specifications annexed to said contract was read in evidence:

**"PAYMENTS.**

"In order to assist the contractor to prosecute the work advantageously, the City Engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

"The first estimate shall be of the value of the labor done and materials incorporated into the herein proposed work since the contractor commenced the performance of the contract on his part and every subsequent estimate except the final estimate shall be [278] of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be made, when in the judgment of the City



(Testimony of J. L. McCormick.)

Engineer the total value of the labor done and materials incorporated into the herein proposed work since the last preceding estimate amounts to less than \$5,000. Such estimates need not be made by strict measurements, but they may be approximate only and shall be based upon the whole amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

"Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer's estimate.

"Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contractor is not complying with the requirements of the contract and specifications."

It was stipulated between respective counsel that on December 19, 1910, at the hour of 11 o'clock and 5 minutes A. M., a petition was filed in this court praying that the Metropolis Construction Company be adjudicated a bankrupt.

Defendant's Portuguese-American Bank Exhibit No. 1, referred to in the foregoing testimony, is as follows:

**[Defendant Portuguese-American Bank Exhibit  
No. 1.]**

Resolution No. 8401, Second Series.

Resolved, that the Metropolis Construction Com-

pany be, and it is hereby allowed the sum of six thousand eight hundred thirty dollars and eighty-five cents (\$6,830.85) as fourth progress payment on its contract for the construction of sewers and [279] appurtenances in Kentucky Street and Fourth Street.

**BOARD OF PUBLIC WORKS.**

Dec. 5, 1910.

Passed.

(Seal of Board of Public Works.)

Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey.

(Endorsed:) Welles v. Daniel et al. Defendant's Portuguese-American Bank Exhibit No. 1. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit No. 2, referred to in the foregoing testimony, is in words and figures as follows:

**[Defendant Portuguese-American Bank Exhibit  
No. 2]**

Resolution No. 8399, Second Series.

Resolved, that the Metropolis Construction Company be, and it is hereby allowed the sum of nineteen thousand, one hundred sixty-seven dollars and twenty cents (\$19,167.20) as fourth progress payment on its contract for the construction of sewers and appurtenances in Seventh Street, from Howard to Hubbell Streets.

**BOARD OF PUBLIC WORKS.**

258     *Paul I. Welles and John Daniel vs.*

Dec. 5, 1910.

Passed.

(Seal of Board of Public Works.)

Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey.

(Endorsed:) Welles v. Daniel et al. Defendant's Portuguese-American Bank [280] Exhibit No. 2. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit No. 3, referred to in the foregoing testimony, is in words and figures as follows:

**[Defendant Portuguese-American Bank Exhibit  
No. 3.]**

Resolution No 8400, Second Series.

Resolved, that the Metropolis Construction Company be, and it is hereby allowed the sum of twelve thousand, one hundred seventy three dollars and seventeen cents (\$12,173.17) as fourth progress payment on its contract for the construction of sewers and appurtenances in the Lower Sunset District.

**BOARD OF PUBLIC WORKS.**

Dec. 5, 1910.

(Seal of Board of Public Works.)

Passed.

Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey.

(Endorsed:) Welles v. Daniel et al. Defendant's Portuguese-American Bank Exhibit No. 3. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit

No. 4, referred to in the foregoing testimony, is in words and figures as follows:

**[Defendant Portuguese-American Bank Exhibit  
No. 4.]**

On motion duly seconded, it was unanimously resolved as follows:

That Chris Emille be, and he is hereby appointed the General Manager of the Metropolis Construction Company, and that as such General Manager he shall have full and exclusive [281] charge and management of the conduct of the affairs of this Corporation. That as such General Manager he shall have full power and authority to compromise and adjust lawsuits, pay obligations, borrow money, to hire and discharge such employees as may be necessary from time to time, to carry on the work and affairs of this Corporation; he shall also be empowered to fix the wages and salaries of such employees and, from time to time, to pay the same out of the funds of this Corporation; he shall also be empowered to purchase such supplies, merchandise, horses, machinery, equipment and other personal property as may be necessary in his judgment, from time to time, to carry on the affairs, work and contracts of this corporation, and at such price or prices as his judgment may dictate. He shall also be empowered to do and perform such other acts and things as may be necessary from time to time to carry on and conduct the affairs of this corporation.

(Endorsed:) Welles v. Daniel. Defendant's Portuguese-American Bank Exhibit No. 4 for Identification. August 18th, 1911. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit No. 5, referred to in the foregoing testimony, is in words and figures as follows:

**[Defendant Portuguese-American Bank Exhibit  
No. 5.]**

"San Francisco, December 17, 1910.

To the Auditor and to the Board of Public Works  
and to the Board of Supervisors of the City and  
County of San Francisco:

Gentlemen: You are hereby notified that the Metropolis Construction Company has assigned for value to the Portuguese-American [282] Bank of San Francisco, the warrants in its favor against the City and County of San Francisco, for the amounts of money hereinafter set forth, being progressive payments on account of the contracts hereinafter set forth, to-wit:

1st: Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract, dated Jan. 5th, 1910, for Kentucky and Fourth Street sewers, the contract being between the Metropolis Cons. Co. and said City and County under the bond issue of 1903.

2nd: Warrant for the sum of \$12,173.17, being fourth progressive payment on account of contract between the Metropolis Cons. Co. and said city and county, and dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd: Warrant for the sum of \$19,167.20, being fourth progressive payment on account of contract between the Metropolis Cons. Co. and said City and County and dated June 22nd, 1910, and being for



construction sewer in 7th Street, Howard to Hubbell Streets, under contract No. 31.

Said assignment was made on the 5th day of December, 1910, and subsequent to the resolutions of the Board of Public Works, authorizing said fourth progressive payments.

Yours very truly,

PORTUGUESE-AMERICAN BANK OF  
S. F.

JAMES B. FEEHAN,  
Attorney."

(Endorsed:) Filed in *Supervisors* 70 Eddy  
St. Dec. 17, 1910. John H. Ryan, Acting Clerk.  
[283] Welles v. Daniel et al. Defendant's Portuguese-American Bank Exhibit No. 5. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit No. 6, referred to in the foregoing testimony, is in words and figures as follows, to wit:

**[Defendant Portuguese-American Bank Exhibit  
No. 6.]**

"San Francisco, Cal., November 19th, 1910.  
Thomas F. Boyle, Esq., Auditor of the City and  
County of San Francisco:

Dear Sir:—You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco is hereby authorized and empowered to draw the warrants in favor of the undersigned against said City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

1st: Warrant for the sum of \$6,964.13, being third progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth Street sewers; the contract being between the undersigned and said City and County under the bond issue of 1903.

2nd: Warrant for the sum of \$10,864.57, being third progressive payment on account of contract between the undersigned and said City and County and dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd: Warrant for the sum of \$4,182.00, being 7th progressive payment under contract between the undersigned and said City and County and dated January 10th, 1903 for the construction of sewer in West Richmond District, and being [284] under bond issue of 1903.

4th: Warrant for the sum of \$8,400.69, being third progressive payment on account of contract between the undersigned and said City and County and dated June 22nd, 1910, and being for construction of sewer in 7th Street, Howard to Hubbell Streets, under contract No. 31.

**METROPOLIS CONSTRUCTION COM-  
PANY.**

(Seal of Metropolis Construction Co., Inc.)

By **CHRIS EMILLE,**

President.

By **L. F. STRONG,**

Asst. Secretary."

Received Auditor's Office Nov. 15, 1910.

THOS. F. BOYLE,

Auditor,

By Ed. Ingwersen,

Deputy.

(Endorsed:) Welles v. Daniel. Defendant's Portuguese-American Bank Exhibit No. 6. A. B. Kreft, Referee.

The foregoing constitutes the testimony taken prior to October 14, 1911, and upon which the report of the Referee and Examiner of October 14, 1911, is based.

The proceedings and testimony following took place on January 9th and 17th, 1912, pursuant to the order of reference made on December 26th, 1911.  
[285]

Mr. FROST.—The Court will please notice that although notice has been duly given, no appearance has been made on behalf of Auditor Boyle. Simply for the sake of getting the record straight, that matter ought to be noted. Now, I hold in my hand here a report of the referee in this case, the case of Paul I. Welles against John Daniel, filed October 14, 1911, the original report, which I offer in evidence.

Mr. HEGGERTY.—No objection.

Mr. FROST.—I ask that that report be considered as read. It is agreed that it need not be incorporated into the evidence. I offer in evidence a memorandum opinion by Judge De Haven, dated and filed December 12, 1911, in this case, and ask that it be considered read, also that it need not be incorporated into the

transcript, being in the files of the court. Any objection?

Mr. HEGGERTY.—No objection.

Mr. FROST.—The same offer is made with reference to the order made December 13, 1911, by the District Court, in this matter, filed December 13, 1911, entitled "Order Approving Report of Referee Granting Injunction, etc.," and ask that this be considered read and not incorporated in the transcript by the stenographer. Complainant rests.

Mr. HEGGERTY.—Subject, of course, if the Court please, to our former objections in which we excepted to the jurisdiction of the Court and stated that we were not appearing and consenting to this action or to this proceeding, we offer in evidence the following portion of the specifications of the contract, the original of which is attached to the bill of complaint, and the original contract, together with the sub-contract being attached [286] to the original bill of complaint in this action, and the specifications being attached to the claim of Mr. Welles in the claim in the bankruptcy matter which is an exhibit in this case. We offer the specifications of the original contract for which specifications are attached as an exhibit to the claim of Mr. Welles, the complainant, in this action, heretofore filed and now on file in this bankruptcy proceedings No. 6827 in bankruptcy, being the bankruptcy of the Metropolis Construction Co., a corporation.

Mr. FROST.—Attached to the claim of Paul I. Welles in the matter of the Metropolis Construction Co., a bankrupt, No. 6827, are the specifications which

have been admitted in evidence with that claim in this case as being the specifications annexed to the original contract of the Metropolis Construction Co. with the City, involved in this case. I understand counsel wants to offer those specifications or some part thereof. What part do you wish to offer?

Mr. HEGGERTY.—The portion of the specifications under the heading "Subcontract" starting with "Sub-contractor"; the sub-heading "Sub-contractor." We offer in evidence the following portion of the specifications described by Mr. Frost commencing with the word "Sub-contract" in the left-hand margin down to and including the words "Contractor's Foreman" in the left-hand margin.

Mr. FROST.—That is objected to on the ground, if your Honor please, that all the issues in this case were found upon the former hearing, and that the findings of fact completely cover all the findings upon all the issues raised by the pleadings; that those findings are conclusive and that unless new issues appear now, that no testimony can be received. [287] That was one of the things that was gone into on the former hearing.

The REFEREE.—What is the purpose of this particular offer?

Mr. HEGGERTY.—We object to being bound or having the referee bound or foreclosed as requested and suggested by Mr. Frost, attorney for complainant, by the report of the referee and by the memorandum opinion to the order introduced in evidence here in this proceeding, the same not being *res adjudicata* or a bar or any other sense or in any respect



to the introduction upon this proceeding or upon this reference of all relevant material and competent evidence within the issues in this case; furthermore, that that report was not a report and is not an adjudication, nor is the order of Court an adjudication upon any matter of fact or thing whatsoever involved in or to be proved, heard, determined and reported, by the referee in pursuance of the order of reference in this proceeding last made, and that your Honor, on the last order of Reference upon which this hearing is taking place, is in duty bound to hear all relevant matter and competent evidence offered by either party or any party to this action, and to report the same in pursuance of the order of reference to the Honorable District Court, 1st Division, in which this cause is pending.

Mr. FROST.—(After argument.) Without waiving my objections, I will make this stipulation that all of the specifications annexed to the contract of the Metropolis Construction Co., with the City and County of San Francisco, and the contract itself, shall be considered in evidence in this cause. Now, that contract is an exhibit with the bill of complaint in this case, and the specifications are annexed to the claim of Mr. Welles in the matter of the Metropolis Construction Co., No. 6827 which is also an exhibit in this case. It is agreed that those specifications, in part or in whole, [288] may be referred to by counsel on argument in this case, and that they may be admitted in evidence, but that they need not be copied unless counsel desires to read some part of them which he wants to call attention to; and that

stipulation is made with the understanding that the objection of complainant to the taking of further testimony is not waived. The stipulation is also made subject to the same reservation that all of the testimony taken upon the former hearing may be considered as evidence upon this hearing as having been heard and read, together with all exhibits introduced upon the former hearing, with the same force and effect as if repeated here, subject to the objection of complainant that this court has not now the right to take further testimony upon that issue.

The REFEREE.—So that I may understand you, the effect of those stipulations is that the evidence may be used in this proceeding, but it is not to be used to change the findings of fact as made?

Mr. FROST.—Yes.

Mr. HEGGERTY.—The same objections and exceptions as appear in the original testimony will be considered as having been taken and made.

Mr. FROST.—Exactly. It is the intention of the stipulations to cover the ground, and if it is not covered, we will cover it.

The REFEREE.—Counsel for the Portuguese-American Bank may introduce such further evidence upon the issues raised by answer to the bill. All the testimony taken on the former hearing is in evidence, together with the exhibits thereon.

Mr HEGGERTY.—As I understand the stipulation, your Honor, it is that all the exhibits, whatever they may be, referred to in the report made by your Honor, or that were introduced by the parties at the last reference, or that appear attached to the [289]

pleadings, either the complaint or the answers, of all the parties or any of the parties, and to the answers to the order to show cause, and the claim exhibits attached to it by Mr. Welles, the complainant, are admitted to have been offered, and are admitted in evidence, subject to the objections of Mr. Frost that the report of the referee heretofore made and confirmed by the Court, and the order of the Court based thereon, prohibit and exclude this evidence or any other evidence upon this hearing. Is that correct?

Mr. FROST.—Yes, that is the situation as I understand it. I take it that there will be nothing new, nothing that I don't know anything about, brought in under that stipulation; but all the evidence that was taken on that former hearing, subject to my objection can come in; and "all evidence" means proceedings, stipulations, exhibits, testimony and the whole record.

Mr. HEGGERTY.—We offer in evidence the following portion of the General Provisions above referred to:

"SUB-CONTRACTS: The contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof, without the consent or authorization of the Board of Public Works.

With his request to the Board of Public Works for his permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for

subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together [290] with such other information as will enable the Board of Public Works to determine the responsibility and standing of said sub-contractor.

No sub-contractor will be considered unless the original contract between the Contractor and the Board of Public Works is made a part thereof, nor unless it appears to the Board of Public Works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sublet, and to complete said work in accordance with these specifications and to the satisfaction of the Board of Public Works.

No sub-contract shall relieve the Contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works."

Mr. HEGGERTY.—Mr. Frost is willing to stipulate, as I understand it, that the Portuguese-American Bank, one of the defendants in this action, at all times mentioned in the bill of complaint was, and is now, a legally created and existing banking corporation, doing business as such in the City and County of San Francisco?

Mr. FROST.—Yes.

Mr. HEGGERTY.—And that the charter of the

City and County of San Francisco as it existed June 1, 1910, and since then to the present time, may be deemed to have been offered and admitted in evidence, and such parts thereof as either party or any party to the action, desires to refer to and use, may be referred to and used as evidence? [291]

Mr. FROST.—Either by incorporation into the transcript, or later on, in argument to the Court.

Mr. HEGGERTY.—We desire to have incorporated into the record this matter which is found in the answer of the Portuguese-American Bank of San Francisco:

**“MATTERS UNDER CONTROL OF THE BOARD.**

Sec. 9. The Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors.

**DRAINAGE.**

2. Of all sewers, drains and cesspools, and of the work pertaining thereto, or to the drainage of the City and County.

**CONDUITS; GARBAGE AND SEWAGE; SEWERAGE AND DRAINAGE SYSTEM.**

7. Of any and all wires and conduits, the collection and construction and maintenance of the sewerage and drainage systems of the City and County.

Sec. 9, Art. VI, Chap. I.

**ACCEPTANCE OF WORK.**

Sec. 22. The work in this Article (Article VI) provided for must be done under the direction and to the satisfaction of the Board of Public Works.



. . . . When said work shall have been completed to the satisfaction and acceptance of the Board, it shall so declare by resolution, and thereupon the Board shall deliver to the contractor a certificate to that effect.

Sec. 22, Art. VI, Chap. I."

Mr. HEGGERTY.—Will you admit that the assignment of the sub-contract by the Metropolis Construction Co. to Mr. Welles, the complainant in this action, was not consented to by the Board of Public Works? [292]

Mr. FROST.—I will admit this, that there was never any formal consent by the Board of Public Works to the sub-contract from the Metropolis Construction Co. to Paul I. Welles; it being also, however, admitted that Mr. Welles acted as a sub-contractor with the knowledge of the Board of Public Works and of its inspector on the job, all the time, openly and without any concealment. He had his name in the telephone book, and he had his sign, "Paul I. Welles" as the sub-contractor on the job.

Mr. HEGGERTY.—That is the case for the defendant.

Mr. FROST.—It will be admitted that the United Railroads has filed a claim in these bankruptcy proceedings January 4th, 1912; "these bankruptcy proceedings" meaning those of the Metropolis Construction Co., No. 6827.

(Testimony closed; case submitted on briefs to be filed.)

The foregoing condensed statement of said evi-

272      *Paul I. Welles and John Daniel vs.*

dence is hereby proposed as a statement to be included in the record for use on appeal herein, and appellants pray that the same be settled and allowed.

Dated February 20, 1913.

A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. M. ATKINS,  
MILTON J. GREEN,

Attorneys for John Daniel, Trustee, Defendant and Appellant. [293]

C. A. S. FROST,  
Attorney for Paul I. Welles, Complainant and Appellant.

Approved \_\_\_\_\_, 1913.

\_\_\_\_\_,  
Judge.

**[Stipulation Approving Engrossed Statement of Proceedings and Testimony.]**

The foregoing engrossed statement of proceedings and testimony is approved and may be settled and allowed by the Court.

**KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,**

Attorneys for Portuguese-American Bank of San Francisco, a Corporation, Defendant and Appellee.

**A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,**

Attorneys for John Daniel, Trustee, Defendant and Appellant.

**C. A. S. FROST,**  
Attorney for Paul I. Welles, Complainant and Appellant.

**EDWARD F. MORAN,**

Atty. for Defendant Boyle, as Auditor. [294]

**[Order Approving and Allowing Engrossed Statement of Proceedings and Testimony.]**

The foregoing and engrossed statement of proceedings and testimony is approved and allowed.

**FRANK S. DIETRICH,**  
Judge.

Dated March 15th, 1913.

Receipt of a copy of the within Statement of Pro-

274     *Paul I. Welles and John Daniel vs.*

ceedings and Testimony to be Included in the Record  
this 20th day of February, 1913, is admitted.

JAMES B. FEEHAN,  
KNIGHT & HEGGERTY,

Attorneys for Defendant Portuguese-American  
Bank.

EDWARD F. MORAN,  
Attorney for Thomas F. Boyle.

Received Feb. 21, 1913.

W. B. MALING,  
Clerk.

By C. W. Calbreath,  
Deputy Clerk.

Filed Mar. 18, 1913. [295]

---

**[Certificate of Clerk U. S. District Court to Tran-  
script of Record, etc.]**

United States of America,  
Northern District of California,—ss.

I, W. B. Maling, Clerk of the District Court of the  
United States for the Northern District of Cali-  
fornia, hereby certify the foregoing and hereunto  
annexed two hundred and ninety-five pages, num-  
bered from 1 to 295, inclusive, contain a full, true  
and correct transcript of the records, as the same  
now appear on file and of record in the Clerk's office  
of the said District Court, in the cause entitled "Paul  
I. Welles, Complainant, vs. John Daniel, Trustee of  
the Estate of Metropolis Construction Company, a  
Corporation, Bankrupt, Portuguese-American Bank  
of San Francisco, a Corporation, and Thomas F.

Boyle, Defendants," and numbered "15,148."

Said transcript has been prepared and made up pursuant to the Praecipis of respective counsel therein, copies of which said Praecipis are incorporated in this Transcript (pages 1 to 8 inclusive), and the personal instructions of C. A. S. Frost, Esquire, Messrs. Knight and Heggerty, and James B. Feehan, Esquire, Attorneys for Appellants herein.

I further certify that the costs of preparing and certifying the foregoing Transcript on Appeal is the sum of One Hundred Fifty-seven Dollars and Seventy cents (\$157.70), and that the same has been paid to me in full as follows: \$154.25, by John Daniel, Defendant and Appellant, and \$2.45, by the Portuguese-American [296] Bank, etc., Defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 12th day of May, A. D. 1913.

[Seal]

W. B. MALING,  
Clerk.

By Lyle S. Morris,  
Deputy Clerk. [297]

---

[Title of Court and Cause.]

**Citation [on Appeal—Original].**

To Portuguese-American Bank of San Francisco, a Corporation, Defendant, to Thomas F. Boyle, Defendant, Greeting:

WHEREAS, John Daniel, Trustee of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled controversy, and Paul



I. Welles, complainant in said controversy, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from an Order or Decree lately, and on January 30th, 1913, rendered in the District Court of the United States for the Northern District of California, made in favor of said Portuguese-American Bank of San Francisco, a corporation, you are, therefore, hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the said District on the 10th day of March, 1913, to do and receive what may appertain to justice to be done in the premises.

WITNESS the Hon. WM. C. VAN FLEET, Judge of said District Court, this 10th day of February, in the year of our Lord nineteen hundred and thirteen and of the Independence of the United States of America the one hundred and thirty-seventh.

WM. C. VAN FLEET,

Judge.

RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Portuguese-American Bank of San Francisco, a Corpn., by handing to and leaving a certified copy thereof with V. L. de Figueiredo, Cashier of said Portuguese-American Bank of San Francisco, a Corpn., personally at San

Francisco, in said District, on the 11th day of February, A. D. 1913.

C. T. ELLIOTT,  
U. S. Marshal.  
By Elmo Warner,  
Office Deputy.

**RETURN ON SERVICE OF WRIT.**

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Thomas F. Boyle, by handing to and leaving a certified copy thereof with Thomas F. Boyle, personally, at San Francisco, in said District, on the 11th day of February, 1913.

C. T. ELLIOTT,  
U. S. Marshal.

By \_\_\_\_\_,  
Deputy.

Filed Feb. 10, 1913.

---

[Endorsed]: No. 2273. United States Circuit Court of Appeals for the Ninth Circuit. Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants, vs. Portuguese-American Bank of San Francisco, a Corporation, Appellee. Transcript of Record. Upon Appeals from the United States Dis-

278      *Paul I. Welles and John Daniel vs.*

trict Court for the Northern District of California,  
First Division.

Filed May 12, 1913.

**FRANK D. MONCKTON,**  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

---

[Title of Court and Cause.]

**Order Enlarging Time [Thirty Days] to File Record  
and Docket Cause.**

On motion of counsel for appellants, it is **OR-  
DERED** that appellants have thirty days' further  
time within which to file the record and docket the  
case, pursuant to Rule Sixteen of the above-entitled  
court.

**WM. W. MORROW,**  
Judge.

Dated March 7, 1913.

Receipt of a copy of the within Order the 7th day  
of March, 1913, is acknowledged.

**KNIGHT & HEGGERTY and  
JAS. B. FEEHAN,**

Attorneys for Portuguese-American Bank of San  
Francisco, Defendant and Appellee.

**EDWARD F. MORAN,**  
Attorney for Thos. F. Boyle, Defendant and Ap-  
pellee.

Filed Mar. 7, 1913.

[Title of Court and Cause.]

**Order Enlarging Time [to May 7, 1913] to File  
Record and Docket Cause.**

On motion of counsel for appellants, it is ORDERED that appellants have thirty (30) days' further time within which to file the record and docket the case, pursuant to Rule Sixteen of the above-entitled court, to wit, thirty days from and after April 7th, 1913.

WM. C. VAN FLEET,  
Judge.

Dated April 5th, 1913.

Time extended thirty days by order March 7, 1913.

Filed Apr. 5, 1913.

---

[Title of Court and Cause.]

**Order Enlarging Time to [May 12, 1913] to File  
Record and Docket Cause.**

On motion of counsel for appellants, it is ORDERED that appellants have to and including Monday, May 12th, 1913, within which to file the record and docket the case, pursuant to Rule Sixteen of the above-entitled court.

Dated May 7th, 1913.

WM. C. VAN FLEET,  
Judge.

The foregoing extension of time may be granted.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,  
Attorneys for Respondent.

Filed May 7, 1913.

Refiled May 12, 1913.

[Title of Court and Cause.]

**Stipulation Concerning Printing of the Record.**

To the Clerk of the Above-entitled Court:

In printing the record you will not print the following:

1. All titles of court and cause, after the first. Insert in lieu of each, the words "Title of Court and Cause," except the entire caption or preamble and title of minute order of December 12, 1911, to be set out in full.

2. Verifications. In lieu thereof print the words "duly verified," with date of verification.

3. Endorsements, except the date of filing.

Dated May 12, 1913.

A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. MAIKINS,  
MILTON J. GREEN,

---

---

Attorneys for John Daniel, Trustee, etc., Defendant  
and Appellant.

C. A. S. FROST,  
Attorney for Paul I. Welles.  
JAMES B. FEEHAN,  
CHARLES J. HEGGERTY,

Attorneys for Portuguese-American Bank of San  
Francisco, a Corporation, Defendant and Ap-  
pellee.

Filed May 14, 1913.



---

No. 2273

---

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

PAUL I. WELLES and JOHN DANIEL, Trustee  
of METROPOLIS CONSTRUCTION COM-  
PANY, a Corporation, Bankrupt,

Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN  
FRANCISCO, a Corporation,

Appellee.

---

**Supplemental**  
**Transcript of Record.**

---

Upon Appeal from the United States District Court  
for the Northern District of California,  
First Division.

---



At a stated term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourth day of May, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee  
of METROPOLIS CONSTRUCTION COM-  
PANY, a Corporation, Bankrupt,

Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN  
FRANCISCO, a Corporation,

Appellee.

**Order on Motion of Appellee for a Writ of Certiorari  
for Diminution of the Record or for Correction  
of Omission from Record by the Filing of a  
Supplemental Transcript of Certain Portions of  
the Record and Evidence.**

ORDERED, motion of counsel for the appellee for a Writ of Certiorari for Diminution of the Record under Rule 18 of this Court, or that this Court may direct that certain omissions from the Transcript filed herein may be corrected by a supplemental transcript properly certified, printed and filed



At a stated term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourth day of May, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of METROPOLIS CONSTRUCTION COMPANY, a Corporation, Bankrupt,

Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation,

Appellee.

**Order on Motion of Appellee for a Writ of Certiorari for Diminution of the Record or for Correction of Omission from Record by the Filing of a Supplemental Transcript of Certain Portions of the Record and Evidence.**

ORDERED, motion of counsel for the appellee for a Writ of Certiorari for Diminution of the Record under Rule 18 of this Court, or that this Court may direct that certain omissions from the Transcript filed herein may be corrected by a supplemental transcript properly certified, printed and filed



herein, under Rule 76 of the Rules of Practice in Equity, argued by Mr. Charles J. Heggerty, counsel for the appellee and on behalf of said motion, and by Mr. C. A. S. Frost, counsel for the appellants and in opposition to said motion, and submitted to the Court for consideration and decision.

Thereupon, on consideration thereof, and the Court being fully advised in the premises, it is ORDERED that the said Motion be, and hereby is granted, and that Mr. Heggerty be, and he hereby is allowed ten (10) days within which to file an additional brief and a certified supplemental transcript of certain additional portions of the record and evidence in the above-entitled cause.

**[Excerpt from Specifications Forming Part of Contract Between the Metropolitan Construction Co. and the Board of Public Works of the City and County of San Francisco, State of California (Annexed to Claim of Paul I. Welles).]**

**GENERAL PROVISIONS.**

**CITY ENGINEER:** Whenever the words "City Engineer," or the personal pronoun used in place thereof, are used herein, they shall be and are mutually understood to refer to the City Engineer of the City and County of San Francisco, State of California, acting directly or through properly authorized agents, limited by the particular duties entrusted to them.

**BOARD OF PUBLIC WORKS:** Whenever the words "Board of Public Works," or the personal pronoun used in place thereof, are used herein, they

*Portuguese-American Bank of San Francisco.* 3

shall be and are mutually understood to refer to the Board of Public Works of the City and County of San Francisco, State of California, acting directly or through properly authorized agents limited to the particular duties entrusted to them.

**INSPECTOR:** Whenever the word "Inspector," or the personal pronoun used in place thereof, is used herein, it shall be and is mutually understood to refer to the inspector or inspectors of the Bureau of Engineering, of the Department of Public Works, of the City and County of San Francisco, State of California, limited by the particular duties entrusted to him or them.

**CONTRACTOR:** Whenever the word "Contractor," or the personal pronoun used in place thereof is used herein, it shall be and is mutually understood to refer to the party or parties contracting to perform the work to be done under this contract, or the legal representatives of such party or parties.

**CITY:** Whenever the word "City," or the pronoun used in place thereof is used herein, it shall be and is mutually understood to refer to the City and County of San Francisco, State of California. [1\*]

**WORK TO BE DONE TO THE SATISFACTION OF THE BOARD OF PUBLIC WORKS:** The Contractor shall do all the work and furnish all the labor, materials, tools and appliances necessary or proper for performing and completing the work herein required in the manner and within the time herein specified, and the work must be done in a workman-

\*Page-number appearing at foot of page of original certified Record.

like manner and under the direction and to the satisfaction of the Board of Public Works, and the materials must be in accordance with the specifications and to the satisfaction of the Board of Public Works.

**INSPECTION:** All work and materials, and the manufacture and preparation of such materials from the beginning of the construction until the final completion and acceptance of the herein proposed work, shall be subject to the inspection and rejection of the City Engineer at such times as may suit his convenience.

The City Engineer may assign such assistants as he may deem necessary to inspect the materials to be furnished and the work to be done under this contract, and to see that the same strictly correspond with the specifications herein set forth.

Any unfaithful or imperfect work or materials that may be discovered before the completion and acceptance of the herein proposed work shall be corrected immediately on the requisition of the City Engineer, notwithstanding that it may have been overlooked by the proper inspector, and it is hereby expressly agreed that the inspection of the City Engineer shall not relieve the Contractor of his liability to furnish material and workmanship in accordance with the specifications and to the satisfaction of the Board of Public Works.

The Contractor shall promptly obey and follow every order or direction which shall be given by the Board of Public Works in accordance with the terms of the contract. [2]

*Portuguese-American Bank of San Francisco.* 5

No inspector will be furnished to any gang of less than twelve (12) men, nor will any lines, levels or grades be furnished or given, when in the opinion of the Engineer, the number of men employed is too small to make proper progress.

Any work done during the absence of an Engineer or Inspector will not be estimated or paid for.

**WORK TO BE DONE TO LINE AND GRADE:**

All work under these specifications shall be done to the lines and grades shown on the plans, points for which will be set by the City Engineer, and the work shall be prosecuted in such manner and from such points, at such times and with such forces as the City Engineer may determine from time to time during its progress.

**ACCESS TO WORK:** During the construction of the herein proposed work, the Board of Public Works and the agents and employees of the Board of Public Works may at any time and for any purpose enter upon the work or the shops where such work may be in preparation and the Contractor shall provide proper and safe facilities therefor. Other contractors performing work for the City under the Board of Public Works may also, for all purposes which may be required by their contracts, enter upon the work.

**INSPECTOR NOT TO BE INTIMIDATED:** The Inspectors at all times shall be free to perform their duties and any intimidation of any Inspector on the part of the Contractor or of the employees thereof, shall be sufficient reason, if the Board of Public Works shall so decide, to annul the contract.

**INTERPRETATION OF SPECIFICATIONS:**

These specifications and plans are intended to be self-explanatory, but should any discrepancy appear or any misunderstanding arise as to the import of anything contained herein, the matter may be referred to the City Engineer, who shall decide the same in accordance with their true intent and meaning [3] as construed by him.

Any corrections of errors or omissions in these specifications or plans may be made by the City Engineer, when such correction is necessary for the proper fulfillment of their intention as construed by him.

The misplacement, addition or omission of any word, letter, figure or punctuation mark will in no way change the true spirit, intent or meaning of these specifications.

Wherever in the specifications, the words "as directed," "as required," "as permitted," or words of like effect are used, it shall be understood that the direction, requirement or permission of the Board of Public Works is intended. Similarly, the words "approved," "acceptable," "satisfactory," or words of like import, shall mean "approved by," or "acceptable to" or "satisfactory to" the Board of Public Works.

Whenever any article or any class of materials is specified by a trade name or by the name of any particular patentee, manufacturer or dealer, it shall be and is mutually understood to mean and specify the article or materials described, or any other equal thereto in quality, finish and durability, and equally



*Portuguese-American Bank of San Francisco. 7*

as serviceable for the purposes for which it is or they are intended, subject to the approval and acceptance of the Board of Public Works.

Any part of the work which is not mentioned in these specifications but is shown on the drawings, or any part not shown on the drawings but described in the specifications, or any part not shown on the drawings or described in the specifications, but which is reasonably implied by either or is necessary or usual in the construction of work of this class shall be furnished and installed by the Contractor as if fully described in the specifications and shown on the drawings.

**LAWS AND REGULATIONS:** In all operations connected with the work, the Charter and all ordinances of the City and County of San Francisco, and all laws of the United States and the State of California [4] which shall be or become applicable to, and control or limit in any way the actions of those engaged in any way as principal or agent, shall be respected and strictly complied with. The Contractor shall keep himself fully informed of all existing State and National laws and City ordinances and regulations in any manner affecting those engaged and employed in or on the work or in any way affecting the conduct of the work, and of all orders or decrees of bodies or officials having jurisdiction or authority over the same. He shall, himself, at all times, observe and comply with and cause any and all persons, firms or corporations employed by him or under him, to observe and comply with all such laws, ordinances and regulations, orders and decrees.

He shall protect and indemnify the City and County of San Francisco, the Board of Public Works and its or their officers, employees and agents against any claim or liability arising from or based on the violation of any such law, ordinance, regulation, order or decree, whether by himself or his employees.

**LEGAL ADDRESS:** The address given in the bid or proposal is hereby designated as the legal address of the Contractor, but such address may be changed at any time by notice in writing, delivered to the Board of Public Works.

The delivering to such legal address or the depositing in any postoffice in a postpaid wrapper, directed to the Contractor at the above address of any drawing, notice, letter or other communication, shall be deemed to be a legal and sufficient service thereof upon the Contractor.

**CONTRACTOR TO MAINTAIN OFFICE:** The Contractor shall maintain an office equipped with telephone instruments connected with local and long distance telephone, in the City and County of San Francisco, during the continuance of his contract and shall have in said office at all times between 8:30 A. M. and 5:00 P. M. (Sundays and legal [5] holidays excepted), a representative authorized to receive drawings, notices, letters, or other communications from the Board of Public Works and such drawings, notices, letters or other communications given to or received by such representatives, shall be deemed to have been given to and received by the Contractor.

The delivering at or mailing to the Contractor's

*Portuguese-American Bank of San Francisco. 9*

office in the City and County of San Francisco (written notice of which address shall be given to the Board of Public Works within ten days of the date of the contract) or the delivering to the Contractor in person or to his authorized representative in said City of San Francisco, of any drawing, notice, letter, or other communication shall also be deemed to be a legal and sufficient service thereof upon the Contractor.

**COMMENCEMENT AND PROSECUTION OF WORK:** The Contractor will be required to commence the work provided for in these specifications within fifteen (15) calendar days after the signing of the contract and to prosecute it diligently from day to day thereafter at such a rate as will enable him to complete the various parts of the work and the whole work within the time herein specified.

**TESTS:** All test specimens necessary for the determination of the character of any of the materials to be used or offered for use in the work herein proposed will be prepared and tested by the City Engineer.

Whenever required by the City Engineer, the Contractor shall furnish all tools, labor and materials necessary to make an examination of any work under these specifications that may be completed or in progress. Should such work be found defective, the cost of making such examinations and of reconstruction shall be defrayed by the Contractor. Should the work be found to be satisfactory, the examination will be paid for by the City in the manner herein prescribed for paying for extra work. [6]

**SAMPLES:** Samples of all materials used or offered for use in connection with this work and information as to their sources must be furnished to the Board of Public Works whenever required, and representatives of the Board of Public Works are to be given all desired facilities for the inspection of materials and processes used or to be used in connection with the work. Samples of the vitrified brick and steel for reinforcement must be submitted by the Contractor to the City Engineer for approval at least fifteen (15) days before it is proposed to use them in the work. Materials delivered on the work during its progress must be equal to the samples furnished. All materials will be inspected and any materials rejected must, on demand, be immediately removed from the work by the Contractor.

All samples shall be submitted in ample time to enable the City Engineer to make any tests or examinations necessary and the Contractor will be held responsible for any loss of time due to his neglect or failure to deliver the required samples to the City Engineer.

**DEFECTIVE MATERIALS AND WORKMANSHIP:** Materials, work or workmanship which in the opinion of the City Engineer do not conform to the specifications and drawings or are not equal to the samples submitted to and approved by the City Engineer shall be rejected.

If any materials used in the work or brought upon the ground, or selected for use in the same, shall be condemned by the City Engineer on account of bad or improper workmanship or as being unsuitable or

not in conformity with the specifications or not equal to the samples submitted, the Contractor shall forthwith remove from the work and its vicinity without delay all such rejected or condemned material of whatever kind, and upon his failure to do so within forty-eight (48) hours after having been so directed by the City Engineer, the condemned material may be removed by the Board of Public Works and the cost of said removal deducted from any money that is [7] then due or that may thereafter become due to the Contractor on account of or by virtue of his contract and no payments shall be made until such material, work or workmanship has been removed and proper materials and workmanship substituted therefor.

Materials or workmanship which, in the opinion of the City Engineer, do not comply with the requirements of the specifications or are not fully equal to the samples submitted to and approved by the City Engineer, may be rejected at any time during the progress of the work, notwithstanding any previous satisfactory testing or inspection on the part of the City Engineer.

**CONTRACTOR TO SUPPLY SUFFICIENT AMOUNT OF MATERIAL:** The Contractor shall at all times keep upon the premises a sufficient amount of materials and shall employ a sufficient number of workmen to complete the work herein specified within the time specified in the contract.

Should the Contractor at any time during the progress of the work refuse, neglect or be unable, in the judgment of the City Engineer, to supply a suf-



ficiency of materials or workmen to complete the work within the time specified in this contract, the City Engineer will notify the Board of Public Works that in his judgment, the Contractor is not providing sufficient materials or workmen to complete the work within the time specified in the contract. Upon receipt of such notice from the City Engineer, the Board of Public Works will notify the Contractor to furnish such workmen or materials as the City Engineer may consider necessary, and if the Contractor does not comply with said notice from the Board of Public Works within three (3) days of the date of service thereof, the Board of Public Works shall have the right to provide the materials and workmen to finish said work and the expense thereby incurred shall be deducted from any moneys due or which may thereafter become due under the contract. [8]

In order to meet the expenses so incurred, the Board of Public Works is hereby authorized by the Contractor to draw a warrant or warrants in the name of the Contractor and in favor of those persons, firms or corporations doing the work or providing the materials and labor, against the fund or appropriation set aside for the purposes of the contract, and when a warrant or warrants are so drawn they shall be conclusive upon the Contractor and shall be to all intents and purposes the same as if drawn by the Contractor in person, and the Auditor is hereby authorized by and on the part of the Contractor, to audit said demand or demands and the Treasurer is

hereby authorized by and on the part of the Contractor, to pay the same.

When any of said demands have been audited and paid, the amount of the same shall be deducted from the fund or appropriation set aside for the purposes of this contract and charged to the Contractor as if drawn by him.

The Board of Public Works shall have the option to terminate the contract in the manner hereinafter set forth, should the Contractor at any time during the progress of the work refuse, neglect, or be unable in their judgment, to supply a sufficiency of material or workmen to complete the work within the time specified in the contract.

**PATENTS:** All fees or claims for any patented invention, article or arrangement that may be used upon or in any manner connected with the doing of the herein proposed work or any part thereof shall be included in the price bid for doing the work herein proposed and the Contractor and his sureties shall protect and hold any and all departments of the City, together with all of its officers and employees, harmless against any and all demands made for such fees or claims against any and all suits and claims brought or made by the holder of any invention or patent, or growing out of any alleged infringement [9] of any invention or patent, and before the final payment is made on account of the contract, the Contractor shall furnish acceptable proof to the Board of Public Works of a proper release from all such fees or claims.

**CITY TO HAVE FREE USE OF PATENTS:**

The Contractor shall grant the City the free use for all time of any patented invention that may be used upon or in any manner connected with the doing of the herein proposed work or any part thereof, for the purpose of replacing or repairing any part or parts of the herein proposed work.

**SUB-CONTRACTS:** The Contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof without the consent or authorization of the Board of Public Works.

With his request to the Board of Public Works for permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together with such other information as will enable the Board of Public Works to determine the responsibility and standing of said sub-contractor.

No sub-contractor will be considered unless the original contract between the Contractor and the Board of Public Works is made a part thereof, nor unless it appears to the Board of Public Works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sub-

*Portuguese-American Bank of San Francisco.* 15

let, and to complete said work in accordance with these specifications and to the satisfaction of the Board of Public Works. [10]

No sub-contract shall relieve the Contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works.

**CONTRACTOR'S FOREMAN:** The Contractor shall at all times during his absence be represented on the work by a foreman or foremen whom he has authorized and who is or are competent to receive and carry out any instructions that may be given to him or them by the Board of Public Works or its representatives, and the Contractor will be held liable for the faithful observance of any instructions which may be delivered to him or to his authorized representative or representatives on the work.

**CONTRACTOR'S EMPLOYEES:** The Contractor shall employ only competent and skillful men to do the work and whenever the City Engineer shall notify the Contractor in writing that any man on the work is, in his opinion, incompetent, unfaithful, disorderly or refuses to carry out the provisions of the contract or uses threatening or abusive language to any official or other person on the work representing the City and County of San Francisco, such man shall be immediately discharged from the work and shall not be employed again on it except with the consent of the City Engineer.

It is mutually understood and agreed that all the

laborers, skilled or unskilled (excepting confidential clerks, chief engineers and superintendents), who may be required in the construction of the work herein proposed, shall be citizens of the United States who are *bona fide* residents of the City and County of San Francisco.

**USE OF STREETS:** The Contractor shall not unnecessarily, in the judgment of the City Engineer, obstruct the streets or roadways by using them for storage of materials and supplies, and no materials or supplies [11] of any description shall be placed at any point along the line of the proposed sewers without first obtaining permission from the City Engineer.

**NIGHT WORK:** No night work requiring the presence of an engineer or inspector will be permitted, except in cases of emergency, and then only to such extent as is absolutely necessary and with the permission of the City Engineer, provided that this clause shall not operate in case of a gang organized for regular and continuous night work. In case any work is performed at night, the Contractor shall provide sufficient artificial light, in the judgment of the City Engineer, to properly prosecute the work.

**SUNDAY WORK:** No Sunday work will be permitted except in case of emergency, and then only with the consent of the City Engineer and to such an extent as he may judge to be necessary. The work to be done shall be under the general supervision of the City Engineer. At his discretion, he may from time to time direct the order in which and points at which the work will be prosecuted, and



*Portuguese-American Bank of San Francisco.* 17

may exercise such general control over the conduct of the work at any time or place as shall be required, in his opinion, to safeguard the interests of the City. The Contractor shall immediately comply with and follow any and all orders and instructions given by the Engineer in accordance with the terms of this contract, but nothing herein contained shall be taken to relieve the Contractor of any of his obligations or liabilities under this contract.

**ACCESS TO WORK:** The Contractor shall furnish proper facilities, by means of ladders or otherwise, to secure convenient access to all parts of the work, as may be required by the City Engineer.

**SPIRITUOUS LIQUORS:** The Contractor shall neither permit nor suffer the introduction or use of spirituous liquors upon or about the work [12] herein contemplated or upon any ground occupied by him in the prosecution of the herein required work.

**SANITARY CONVENIENCES:** Necessary conveniences will be constructed by the Contractor where needed for the use of laborers on the work, and their use shall be strictly enforced. The Contractor shall obey and enforce such sanitary regulations as may be prescribed by the Board of Health.

**OFFICE AND TELEPHONE:** The Contractor will construct on the work where directed by the City Engineer, a suitable office equipped with a table not less than three (3) feet wide by six (6) feet long; three chairs, a set of the plans and specifications. Telephone instruments connected with local and long distance telephones will be installed

therein and maintained at the expense of the Contractor.

Representatives of the Board of Public Works and the City Engineer, are to have the free use of this office and telephone.

**CO-OPERATION:** The Contractor shall co-operate with all other contractors who may be employed by the Board of Public Works on construction work in or on the streets in which the herein proposed work is to be performed, and he shall so conduct his operations as not to interfere with the work of other contractors or workmen employed by the Board of Public Works. He shall promptly make good, at his own expense, any injury or damage that may be sustained by the work of other contractors or employees of the Board of Public Works at his hands.

Any differences or conflicts which may arise between the Contractor and other contractors or the workmen of the Board of Public Works in regard to their work shall be adjusted and determined by the City Engineer. The Contractor shall suspend any part or all of the work herein specified or shall carry on the same in such a manner [13] as may be prescribed by the City Engineer, when the City Engineer considers such suspension or prosecution of the work necessary in order to facilitate the work of other contractors or workmen and no damage or claim by the Contractor will be allowed therefor other than an extension of the time specified in this contract for the completion of the work, for such a period of time as the City Engineer shall

*Portuguese-American Bank of San Francisco.* 19

certify in writing that the Contractor has been, in his opinion, delayed in the final completion of the work by reason of the work of other contractors or workmen.

The Contractor shall be held liable for any damage or delay to other contractors which may be caused by unnecessary delay or carelessness on his part.

**PROTECTION OF THE WORK AND THE PUBLIC AGAINST DAMAGE:** The Contractor shall protect his work and materials from damage due to the nature of the work, the action of the elements, the carelessness of other contractors, or from any other cause whatsoever, until the completion and acceptance of the work. Should any such damage occur, he shall repair it at his own expense, and leave the work to the satisfaction of the Board of Public Works in every particular. Neither the Board of Public Works nor any of its agents assumes any responsibility for collecting indemnity from the person or persons causing damage to the work of this Contractor.

The Contractor shall assume all responsibility for damage, arising from or in consequence of the execution of his contract, to adjoining work or property, the streets, sidewalks, mains, pipes, wires, poles or any other structures, interest or persons whatever, during the progress of the work contracted for, and shall furnish all guards, walks and lights and take all necessary precautions to prevent such damage.

**REMOVAL OF RUBBISH:** During the progress of the work the Contractor shall remove, upon de-

mand, such refuse material resulting from his [14] work or resulting from the work of other contractors as the City Engineer may direct. No additional allowance will be made for this work in the final estimate.

**CONNECTIONS WITH PROPOSED SEWERS:**

The Board of Public Works shall have the right to discharge sewage into, connect any sewer or sewers with the sewer or sewers herein proposed, and no extra allowance will be made the Contractor in the final estimate on account thereof, and it is mutually agreed and understood that the making of such connection or connections and the discharge of sewage therefrom into the sewer or sewers herein proposed shall not be construed as an acceptance of any part of the work contracted for.

**SEWERS TO BE CLEANED:** During the progress of the work and until the entire completion and final acceptance thereof, the sewers, connections and their appurtenances are to be kept thoroughly clean throughout and left clean. If, in the final inspection of the work herein proposed, any obstruction or deposit is discovered in the sewers, appurtenances or any of their connections constructed under this contract, it shall, upon demand by the City Engineer, be removed at once by the Contractor.

**CONTRACTOR TO INFORM HIMSELF CONCERNING UNUSUAL DIFFICULTIES:** The Contractor is directed to inform himself, by carefully examining the location of the work and by such other means as he may prefer, as to the character and respective amounts of all the classes of material

*Portuguese-American Bank of San Francisco.* 21

that may be encountered in doing any excavating that may be necessary for the proper prosecution of the work herein contemplated and also of the amount of storm water, ground water and sewage he will be required to pump, bail or otherwise remove. He is also directed to make a special exhaustive inquiry at the office of any person or persons owning, controlling or operating any system or systems of railways, pipes, conduits, wires or any other structures that may be [15] on, over or under the surface of the street or streets along which the proposed work is to be done, and to determine, to his satisfaction, the character, size, location and length of such system or systems of railways, pipes, conduits, wires, structures, etc., and the extent that they will increase the expense of performing the work herein proposed, and to inspect the public records of the various City Departments having cognizance or control of systems of railways, pipes, conduits, sewers, wires or any other structure or structures that may be on, over or under the surface of the streets, and he is hereby directed to include in the unit price that he bids for the various portions of the work herein proposed, any and all expense he may be put to because of the existence and handling of any difficult or unusual classes of material, unusual amounts of storm water, ground water, and sewage in performing any part of the work herein contemplated and because of any additional work or delay that may be caused directly or indirectly by any or all of the hereinbefore mentioned or any other obstructions, and it is clearly understood that the



Board of Public Works does not insure the accuracy of any of the before mentioned records, reports or information and the Contractor agrees not to make any claim against the City and County of San Francisco or any of its officials or employees for any damage, extra work or expense caused by unforeseen difficulties of construction or occasioned by his relying upon any such records, reports or information, either as a whole or in part, furnished by any City Department, official or employee, or by any Company.

**CHANGES AND EXTRAS:** The Contractor shall do any and all extra work necessary for the proper construction or completion of the whole work herein contemplated that may be ordered by the Board of Public Works, in accordance with the provisions of Resolution No. 1246 (Second Series), of the Board of Public Works, and as full compensation for such extra work the Contractor shall accept an amount [16] equal to the actual cost of the work estimated by the Board of Public Works plus twenty (20) per cent for profit. In estimating the cost for extra work no allowance will be made for the use of tools, plant, or for general superintendence.

**ALTERATIONS:** The Board of Public Works, by resolution, may order alterations in the amount or dimensions of the work herein contemplated or any part thereof, either before or after the commencement of construction.

If said alterations increase the amount of concrete, reinforcing steel or excavation required to complete the work, the Contractor shall accept as full com-

*Portuguese-American Bank of San Francisco. 23*

pensation for such increase in material and labor, the following amounts:

For each such cubic foot of concrete completed in place.....\$0.25

For each such pound of reinforcing steel in place .....\$0.04

For each such cubic yard of excavation, including such additional or extra shoring, bracing, pumping and draining that said excavation may necessitate.....\$0.75

In case said changes decrease the amount of concrete, reinforcing steel or excavation required by the plans, the price bid by the Contractor for doing the work herein required shall be decreased in the final settlement by the following amounts:

For each cubic foot of concrete less than required by the plans.....\$0.25

For each pound of reinforcing steel less than required by the plans.....\$0.04

For each cubic yard of excavation less than required by the plans.....\$0.75

If such alterations diminish the quantity of work or materials of a class for which there is no price established in the contract, there shall be deducted from the contract price an amount equal to the actual cost of the work not performed, as estimated by the City Engineer, plus fifteen (15) per cent of said actual cost. In estimating the cost of work not performed no allowance will be made for the use [17] of tools, plants, or for general superintendence and the Contractor shall make no claim for damages because of anticipated profits on any work

that may be dispensed with.

In case such alterations increase the amount of work or materials of a class for which there is no price established in the contract, the Contractor shall accept as full compensation for such additional work an amount equal to the actual cost of the additional work as estimated by the City Engineer, plus fifteen (15) per cent for profit. In estimating the cost of additional work, the City Engineer will make no allowance for the use of tools, plants or for general superintendence.

**TERMINATION OF CONTRACT:** All conditions of this contract are considered material and failure to comply with any of said conditions on the part of the Contractor shall be deemed a breach of the contract.

Should the Contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated.

The passage of a resolution by the Board of Public Works stating that the contract is terminated and the service of a copy of said resolution upon the Contractor shall be deemed a complete termination of the contract.

Upon the contract being so terminated, the Contractor shall immediately remove from the vicinity of the work all materials and personal property belonging to him, which have not already been used in the prosecution of the work, or which is not in place in the work, and he shall forfeit all sums due

*Portuguese-American Bank of San Francisco.* 25

to him under the contract, and both he and his sureties shall be liable upon his bond for all expense and damages caused the City and County of San Francisco by reason of his failure to complete the contract.

**MEASUREMENTS, ETC.:** In estimating and allowing quantities, all lengths will be based on horizontal measurements. [18]

Main sewers will be measured along their center lines, from center to center of manholes.

Side sewers and culvert pipes will be measured from the bell of the slant of the T branch.

No extra allowance will be made for slants, future pipe sewer connections or culvert connections in the masonry sewers.

No extra allowance will be made for closing openings in existing brick sewers with brick work.

All cut-offs from piles are to be the property of the Contractor and no allowance will be made for the portion of the pile above the cut-off.

**PRICE TO COVER:** In naming a price for performing the work of constructing any of the herein described sewers and structures, bidders are directed to include in said price the cost of completing the sewer or structure, together with the cost of removing the existing sewers from the streets wherein the new work is proposed, or opening and filling them with sand and removing and disposing of their contents, as ordered by the Board of Public Works, the cost of excavating, lagging or shoring and bracing, draining, refilling, disposing of surplus material from and removing and restoring the pavement over

such excavations as are necessary and maintaining such property of public service corporations and underground structures as may be encountered in the performance of said work, as no additional allowance will be made in the final estimate for performing any of the above named work.

**HOURS OF LABOR:** In the performance of the herein proposed work, eight (8) hours shall be the maximum hours of labor on any calendar day.

**AMOUNT OF WORK ESTIMATED:** The amount of each class of work has been preliminarily estimated as follows, and this estimate will be used as a basis for comparing bids. The Board of Public Works does not expressly [19] or by implication agree that the actual amount of work will correspond to said estimate, but reserves the right to increase or decrease the amount of any class or portion of the work as is in its opinion to the interest of the City and County of San Francisco.

**BASIS OF FINAL PAYMENT:** Final payment will be made on the basis of the amount of each class of work actually done in accordance with the specifications and to the satisfaction of the Board of Public Works. [20]

**[Certificate of Referee in Bankruptcy to Part of Specifications Called "General Provisions."]**

I, Armand B. Kreft, Referee in Bankruptcy, to whom the Matter of Metropolis Construction Co., Bankruptcy, #6827, in the District Court of the United States for the Northern District of California, was referred, do hereby certify the foregoing to be a full, true and correct copy of that part of



*Portuguese-American Bank of San Francisco. 27*

the specifications called "General Provisions," which are annexed to and made part of the contract between the Metropolis Construction Co., and the Board of Public Works of the City and County of San Francisco, State of California, dated July 22, 1910, and which are annexed to the claim of Paul I. Welles, filed in my office in said District Court of the United States, in the Matter of Metropolis Construction Company, a Corporation, Bankruptcy, No. 6827, now remaining on file and of record in my office.

ATTEST my hand, this 28th day of April, A. D. 1914.

ARMAND B. KREFT,  
Referee in Bankruptcy.

**[Certificate of Clerk U. S. District Court to Copy of  
Certified Copy of That Part of Specifications  
Called "General Provisions," etc.]**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed twenty pages, numbered from 1 to 20, inclusive, contain a full, true and correct copy of a certified copy made by A. B. Kreft, Referee in Bankruptcy, of that part of the "Specifications" called "General Provisions," annexed to the contract between the Metropolis Construction Co. and the Board of Public Works of the City and County of San Francisco, dated July 22, 1910, and which specifications are annexed to the claim of Paul I. Welles, in the Matter of the Metropolis Construction Co.,

28      *Paul I. Welles and John Daniel vs.*

No. 6827, in Bankruptcy, as the same now appears on file and of record in my office, in case No. 15,148, Paul I. Welles, Complainant, vs. John Daniel, Trustee of the Estate of Metropolis Construction Co., a Corp., Bankrupt, Portuguese-American Bank of San Francisco, a Corp., and Thomas F. Boyle, Defendants.

I further certify that said Armand B. Kreft, Esq., is a duly appointed Referee in Bankruptcy of this court, and that the bankruptcy matter of the Metropolis Construction Co. herein referred to was duly referred to and is now pending before said Referee.

I further certify that the costs of preparing and certifying the foregoing is the sum of Ten Dollars (\$10), and that the same has been paid to me by the attorney for the Portuguese-American Bank of San Francisco, a corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said District Court this 8th day of May, A. D. 1914.

[Seal]

W. B. MALING,  
Clerk.

By C. W. Calbreath,  
Deputy Clerk.

---

[Endorsed]: No. 2273. United States Circuit Court of Appeals for the Ninth Circuit. Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants, vs. Portuguese-American Bank of San Francisco, a Corporation, Appellee. Supplemental

*Portuguese-American Bank of San Francisco.* 29  
Transcript of Record. Upon Appeal from the United  
States District Court for the Northern District of  
California, First Division.

Received and filed May 8, 1914.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

Upon Appeals from the United States District Court for the Northern District of California, First Division.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

At a Stated Term, to-wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-Room Thereof, in the City and County of San Francisco, in the State of California, on Thursday, the Thirtieth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Present:

The Honorable William B. Gilbert, Circuit Judge;  
Honorable Erskine M. Ross, Circuit Judge;  
Honorable Charles E. Wolverton, District Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company, a Corporation, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

*Order of Submission.*

On motion of Mr. Charles J. Heggerty, counsel for the appellee,—  
Mr. C. A. S. Frost, counsel for the appellants consenting thereto,—  
Ordered, appeals in the above-entitled cause submitted to the Court for consideration and decision on briefs, without oral argument, with leave to the appellants to file a reply-brief within ten (10) days from this date, and with leave to the appellee to reply thereto within five (5) days thereafter, if desired.

At a Stated Term, to-wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-Room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Ninth Day of March, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

**Present:**

The Honorable William B. Gilbert, Circuit Judge, Presiding;  
Honorable Erskine M. Ross, Circuit Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

*Order Directing Filing of Opinion and Filing and Recording of Decree.*

Ordered, that the opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with said opinion.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

*[Opinion U. S. Circuit Court of Appeals.]*

Appeals from the United States District Court for the Northern District of California, First Division.

A. F. Morrison, P. F. Dunne, W. I. Brobeck, Gavin McNab, B. M. Aikins, and Milton J. Green, for Appellant, John Daniel.

C. A. S. Frost, for Appellant, Paul I. Welles.

George A. Knight, Charles J. Heggerty, James B. Feehan, and Joseph W. Beretta, for Appellee.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

The controversy herein concerns a fund of \$6,830.85, which became payable as the fourth progress payment to the Metropolis Con-



struction Company, for work in constructing a sewer under a contract with the Board of Public Works of the City and County of San Francisco. On or before December 5, 1910, the Construction company made a claim for that sum as due under its contract. On December 5th the Board of Public Works by resolution approved the claim. On the same day the Construction Company presented to the appellee a certified copy of the resolution together with two other such resolutions of dates prior thereto, approving claims aggregating about \$38,000.00, also a paper addressed to the city auditor, of date December 5, 1910, notifying him that the appellee was authorized and empowered to draw warrants in favor of the Construction Company for the payments on the contract. The appellee thereupon loaned to the Construction Company \$35,000.00. The claim for the fourth progress payment was not approved by the Board of Supervisors or the Mayor until January 3 and 4, 1911, nor did that Board or the Mayor receive notice of the order of the Construction Company on the auditor or of the rights of the appellee thereunder until December 19, 1910. In the meantime, on December 12 and 16, the appellant Welles, who was a subcontractor on the sewer work, gave a notice to the auditor, to the Board of Public Works and to the Board of Supervisors, to withhold from the Construction Company the fourth progress payment of \$6,830.85 under the provisions of Section 1184 of the Code of Civil Procedure. On December 17, 1910, the appellee notified the auditor, the Board of Public Works and the Supervisors that it claimed an assignment from the Construction Company of the fourth progress payment. On December 19, 1910, a petition in bankruptcy was filed against the Construction Company, and on January 5, 1911, it was adjudged a bankrupt. On January 26, 1911, the appellee began an action in the Superior Court of the State of California against the auditor to recover the money in controversy. On April 18, 1911, Welles began the present suit in equity against the appellee, the bankrupt, the auditor and the trustee in bankruptcy. Thereupon an order was made requiring the defendants in this suit to show cause why the auditor should not pay the money to the trustee to abide the result of the suit, and to show cause why the appellee should not be enjoined from prosecuting its action. The auditor and the appellee made return to the order. On July 11, 1911, the cause was referred to a referee to hear testimony and find facts on the order to show cause. On October 14, 1911, the referee made his report finding the facts, and no objections having been taken thereto the report was confirmed on December 12, 1911, and an order was made enjoining the appellee from prosecuting its action in the state court, and directing the auditor to pay the \$6,830.85 to the trustee in bankruptcy to abide the result of the suit. In the meantime, on October 6, 1911, the bankrupt filed its answer to the bill of complaint. On December 26, 1911, the cause was referred to the referee on final hearing to hear testimony and proof and find facts upon the issues arising on the pleadings. On March 8, 1912, the referee filed a brief report to the effect that his former findings were res adjudicata. To that report the appellee filed exceptions. On April 15, 1912, the excep

tions were sustained and the cause was again referred to the referee to ascertain and report the facts and his conclusions of law on the testimony taken and on file. On July 16 he reported his findings of fact, finding that the fourth progress payment was assigned to the appellee and that the right of the appellee to receive the same was not affected by the notices to withhold made by the appellant Welles. This report was subsequently confirmed. From the decree thereon rendered the present appeal is taken.

GILBERT, *Circuit Judge*, after stating the case:

The appellant Welles contends that he is entitled to priority by virtue of his notice to withhold, which was given under Section 1184 of the Code of Civil Procedure. That section provides, in substance, that a subcontractor may at any time give to the reputed owner a written notice that he has performed labor or furnished material, or both, to the contractor, which notice shall contain, among other things, the amount and value of that which has been furnished by the subcontractor, and that upon such notice being given it shall be the duty of the person who contracted with the contractor to withhold from the contractor, "sufficient money due or that may become due to such contractor or other person to answer such claim and any lien that may be filed thereafter for record under this chapter, including counsel fees not exceeding \$100 in each case, besides reasonable costs provided for in this chapter." The remedy thus provided for is disconnected from and additional to the remedy by lien upon the structure, and it has been held that it should be regarded with favor by the courts, *Bates v. Santa Barbara County*, 90 Cal. 543, that the notice operates as an assignment pro tanto of that which is due or to become due to the original contractor, and that that amount is sequestered as though under garnishment. *Hampton v. Christensen*, 84 Pac. 200. But the notice to withhold does not affect claims that have previously become due and have been transferred for value by the contractor. *Newport Wharf & Lumber Co. v. Drew*, 125 Cal. 585. In the case last cited the court said: "The contractor cannot prevent the effect of this notice as to any payments that may mature after it is given, but its effect on payments that have matured before it is given, but which have not been made, is to be determined by the rights of the contractor in reference to them. If he is still entitled to demand their payment from the owner, such payment is intercepted by the notice, but if he has already assigned them to a third party, the notice will be inoperative to prevent their payment to such party." And referring to the contract under consideration in that case, the court said: "The contract provided that the work be done to the satisfaction of the board of trustees, and the contractors were not entitled to demand payment of the amount of the estimate until after such approval and acceptance. Their approval of the estimate and direction for its payment implied their satisfaction with the work without any formal declaration to that effect. Upon such approval and direction the obligation of the state which had

been created in favor of the contractors by the trustees became complete, and the right of the contractors to immediate payment became vested in them and was subject to their disposition. The provision in the contract for payment of the contract price in Comptroller's warrants on the state treasurer did not affect this power of disposition, or right to immediate payment, or suspend its exercise until such warrants should be obtained." It is urged that the fourth progress payment in the present case was not due, and that the demand of the Construction Company therefor did not mature by virtue of the resolution of the Board of Public Works, that there still remained to be obtained the approval of the Board of Supervisors and of the Mayor. Reference is made to the city charter then in force, Article II, Chapter 1, Section 19, which provides that all demands payable out of the treasury must be first approved by the Board of Supervisors before they can be approved by the auditor or paid by the treasurer, and that all demands for more than \$200 shall be presented also to the Mayor for his approval and that all resolutions directing the payment of money other than salaries or wages when the amount exceeds \$500 shall be published for five successive days, Sundays and legal holidays excepted, in the official newspaper. The contract in this case, however, was not made directly with the city. It was made between the Construction Company and the Board of Public Works under authority granted to that board by the charter. That Board was given therefore the power to decide that the conditions of the contract had been fulfilled and to approve claims for work done thereunder and to direct the payment of the same. The provision of that charter in regard to approval by the supervisors and mayor was a general precautionary measure prescribed as to all payments of money by the city, and it was intended only for the greater protection of the city. It had not the effect to vest in that board or the mayor authority to determine whether contracts had been complied with or whether payments had become due thereunder in cases where such power had been expressly delegated to the board of public works. The provision for the approval of the board of supervisors and the mayor, as related to the present case, stands upon the same plane as the contractual provision which was under review in *Newport Wharf & Lumber Co. v. Drew*, providing for the payment of the contract price in comptroller's warrants to be drawn on the state treasurer.

If therefore the appellee was on December 5, 1910, the assignee in good faith for value, of the fourth progress payment, its equities are superior to those of the appellant Welles. But it is urged that it was not such an assignee, that the contract in express terms provided that without the consent of the Board of Public Works the contractor "shall not either legally or equitably assign any of the moneys payable under this contract or his claim thereto," and that the Board neither knew nor assented to the assignment. The question arises whether this provision of the contract makes void the assignment which was made to the appellee. "A contract to pay money may doubtless be assigned by the person to whom the

money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable." *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 488. In *Devlin v. Mayor, etc. of New York*, 63 N. Y. 8, Judge Allen said: "Parties may in terms prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations."

The appellee cites cases to the proposition that a provision whether contained in the instrument itself, or expressed in a statute, forbidding the assignment of the contract, or of any interest therein, does not stand in the way of a transfer of the moneys which have become due or are to become due the contractor thereunder. *Mueller v. Northwestern University*, 195 Ill. 236; *Lowry v. City of Duluth*, 94 Minn. 95; *Norton v. Whitehead*, 84 Cal. 263. Those decisions are based upon the proposition that the thing assigned is not the precise thing which is forbidden to be assigned. They are not directly applicable to the contract under consideration here, for the reason that here the prohibition is not against the assignment of the contract, but against the assignment of the moneys payable thereunder without the consent of the Board of Public Works. Cases are cited also which hold that where the contract prohibits assignment an assignment for security is not within the prohibition. *Fortunato v. Patten*, 147 N. Y. 277; *Crouse v. Mitchell*, 130 Mich. 347; *Butler v. Gage*, 14 Colo. 125. Those cases are not in point for the reason that here the prohibition is against both the legal and the equitable assignment of the moneys.

It is contended further that such a provision against assignment is intended for the benefit of the city alone, and that no one else can complain of its breach. *Fortunato v. Patten*, 147 N. Y. 277 is cited as a case in which it was so held. But in *Burek v. Taylor*, 152 U. S. 635, where a contract with a state for the erection of a public building was made unassignable by express stipulation, it was held that an attempted transfer of an interest in the contract without the state's consent was ineffectual further than to give a right of action against the contractor for a measure of the profits. It is argued, however, that that case is to be distinguished from the case at bar in that there was an absolute covenant on the part of the contractor in that case that the contract should not be assigned in whole or in part without the consent of the state. But the contract in the present case having been assented to in all its terms by the contractor is as binding upon him as if his obligations had been affirmatively expressed in a covenant to abide by the same. In *Burek v. Taylor* the Court said of the provision against assignment:

"It may be conceded that, primarily, it was a provision intended, although not expressed, for the benefit of the State, and to protect it from interference by other parties in the performance of the contract, to secure the constant and sole service of a contractor with whom the State was willing to deal, and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interest in the contract

it had no previous knowledge, and to the acquisition of whose interests it had not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him."

We see no reason why this provision of the contract under consideration shall not be given the meaning and effect which its words import. It plainly stipulates against the assignment of the payments. There must have been substantial grounds for embodying such a provision in the contract. We may assume that one of the purposes, and probably the principal purpose thereof, was to protect subcontractors in their equitable rights to the unpaid funds in the hands of the city in case notice should be given under Section 1148, and to afford such subcontractors better opportunity to secure payment for that which they might contribute to the work which was under construction, as well as on behalf of the city to avoid the possible complications and litigation that might attend the transfer to another of the payments accruing under the contract. In a similar case the Supreme Court of Nebraska said:

"But it is needless for us to speculate on the motives for the city's action. It is enough for us to know—whatever its reasons may have been—that it has, in plain language, stipulated against an assignment of the contract. To hold that it covers some, but not all, of the rights and obligations arising out of the contract, would be, it seems to us, an inexcusable perversion of its terms." *City of Omaha v. Standard Oil Co.*, 55 Neb. 337. And again in *Murphy v. City of Plattsmouth*, 78 Neb. 163, that court held that where a contract with a city for a public improvement expressly provides that it shall not be assigned, such provision is enforceable, and an assignee thereof cannot recover the money due thereunder, or any part thereof. In 20 Am. & Eng. Enc. of Law 1156 it is said: "It is frequently provided by charter or statute or the contract itself, that a contract with a municipality shall not be assigned without the consent of the city, and such a provision is valid and operative according to its terms." Citing *Deffenbaugh v. Foster*, 40 Ind. 382; *Suburban Electric Light Co. v. Hempstead*, 38 N. Y. 443. In the first of the cases so cited it was held that where a contract for street improvement contained a provision that the contract should not be assigned without the consent of the common council, no one besides the contractor can maintain an action thereon in the absence of the common council's consent. The second case is of similar import.

The decree is reversed and the cause is remanded with instructions to enter a decree for the appellant Welles.

[Endorsed:] Opinion. Filed Mar. 9, 1914 [signed] F. D. Monckton, Clerk.



## United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee- of METROPOLIS CON-  
STRUCTION COMPANY, a Corporation, Bankrupt, Appellants,  
VS.  
PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation,  
Appellee.

*Decree [U. S. Circuit Court of Appeals].*

Appeals from the District Court of the United States for the North-  
ern District of California, First Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, First Division, and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in favor of the appellants and against the appellee, and that this cause be, and hereby is remanded with instructions to enter a decree for the appellant Welles.

It is further ordered, adjudged and decreed by this Court, that the appellants recover against the appellee for their costs herein expended, and have execution therefor.

[Endorsed:] Decree, U. S. Circuit Court of Appeals. Filed and Entered Mar. 9, 1914 [signed] F. D. Monekton, Clerk.

At a stated Term, to-wit: the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court-Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixth day of July, in the year of our Lord one thousand, nine hundred and fourteen.

**Present:**

The Honorable William W. Morrow, Circuit Judge, Presiding;  
Honorable William C. Van Fleet, District Judge;  
Honorable Maurice T. Dooling, District Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee- of METROPOLIS CON-  
STRUCTION COMPANY, a Corporation, Bankrupt, Appellants,  
vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation,  
Appellee.

*Order Directing Filing of Opinion and Entry of Order Denying  
Petition for Rehearing.*

Ordered, that the Opinion on Petition for Rehearing this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk, and that an order denying the petition for a rehearing in said cause be recorded in the minutes of this Court in accordance with the said opinion.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee- of METROPOLIS CON-  
STRUCTION COMPANY, a Corporation, Bankrupt, Appellants,  
vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation,  
Appellee.

*[Opinion U. S. Circuit Court of Appeals on Petition for Rehearing.]*

GILBERT, Circuit Judge:

In aid of its petition for a rehearing the appellee was permitted to bring before this court certain portions of the record in the court below which were not contained in the transcript on the appeal, the same being certain provisions of the specifications which were referred to and made a part of the contract which was involved. The appellants answering the petition, object to the consideration of the new matter so brought before us, on the ground that the same was not read to nor brought to the attention of the court below. It is unnecessary to discuss that objection, for in our opinion the new matter so presented is not of such a nature as to affect the decision of the case on the appeal. The provisions of the specification so added to the record are as follows: "All conditions of this contract are considered material and failure to comply with any of said conditions on the part of contractor shall be deemed a breach of the contract. Should the contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated." Then follow provisions as to the manner in which the contract may be terminated, and the provision that upon such termination the contractor shall forfeit all sums due him under the contract, and that both he and his surety shall be liable

upon his bond for all damages caused to the city by reason of his failure to complete the contract.

These provisions, in brief, give to the Board of Public Works the option to terminate the contract upon the failure or neglect of the contractor to perform any of the conditions thereof. It is not declared that the right to terminate the contract is the only remedy against the contractor for breach thereof, or of any of its provisions. On the contrary, it is declared that the Board of Public Works shall have that right, "whether any alternative right is provided or not." The provision that without the consent of the Board of Public Works the contractor "shall not either legally or equitably assign any of the moneys payable under this contract, or his claim thereto," is in no way affected by the provisions of the specifications above quoted. By no principle of reasoning can it be concluded that the provision for the termination of the contract upon breach of condition is tantamount to assent by the Board to the transfer of any of the moneys payable under the contract, or the contractor's claim thereto, nor would the act of terminating the contract, if resorted to, be an adequate remedy or any remedy for such a breach, and indeed the Board of Public Works might have no means of knowing that an assignment had been made. That breach of the contract is unlike all other possible breaches thereof, in that the latter are open and visible upon an inspection of the work, the maxim *expressio unius est exclusio alterius*, invoked by the appellee, is not applicable. The question is not one of the construction of a statute, but it is what was the intention of the parties as expressed in a contract. We find neither authority nor reason for applying the maxim to the provisions of a contract relating to the remedies to be pursued for default therein. The reverse has been held in a well-considered opinion in *Straus v. Yeager*, 93 N. E. 881.

It may be added that the District Court of Appeals of the State of California has recently decided a case in which it has expressed views which accord fully with the decision of this court. That court said: "There seems no valid reason for denying that parties may legally agree and bind themselves that such contract shall not be assigned. There is nothing in the statute to prohibit an agreement to that effect, nor is it opposed to any principle of sound public policy. \* \* \* The assignment, however, in violation of the express provision of the contract, under the authorities, was null and void, even as to respondent company." *Butler v. San Francisco Gas & Electric Co.*, 16 C. A. D. 946.

The petition for a rehearing is denied.

(Endorsed:) Opinion on Petition for a Rehearing. Filed July 6, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

At a stated Term, to-wit: the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court-room thereof, in the City and County of San Francisco, in the State of California, on Monday the sixth day of July, in the year of our Lord One Thousand, Nine Hundred and Fourteen.

Present: The Honorable William W. Morrow, Circuit Judge, Presiding; Honorable William C. Van Fleet, District Judge; Honorable Maurice T. Dooling, District Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

*Order Denying Petition for a Rehearing and Staying Issuance of Mandate under Rule 32.*

In accordance with the opinion this day rendered by this Court in the above-entitled cause, and by direction of the Honorable William B. Gilbert and Erskine M. Ross, Circuit Judges, and Charles E. Wolverton, District Judge, before whom the cause was heard, it is ordered that the Petition filed April 6, 1914, on behalf of the appellee for a rehearing of the above-entitled cause be, and hereby is denied.

Thereupon, on motion of Mr. Charles J. Heggerty, counsel for the appellee, and good cause therefor appearing, it is ordered that the issuance of the mandate under Rule 32 of this Court in the above-entitled cause be, and hereby is stayed for the period of sixty (60) days from date.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation), Appellee.

*Notice of Petition for Appeal [to Supreme Court U. S.] and Severance.*

To the above named appellants, Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, and to Thomas F. Boyle, Auditor of the City and County of San Francisco:

You are hereby invited to join with the above named appellee, Portuguese-American Bank of San Francisco, a corporation, on or

before August 1st, 1914, in an appeal which it is about to take to the Supreme Court of the United States from the decree rendered and entered in the above entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit, on the 9th day of March, 1914, or you will be deemed to have refused to join in said appeal and to have acquiesced in said decree and the above named appellee will prosecute said appeal without joining you therein.

And you are hereby notified that the above named appellee will, on the first day of August, 1914, present its petition for appeal from the decree aforesaid to Honorable W. W. Morrow, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, at his Chambers, in the United States Post Office Building, in San Francisco, California, at the hour of 10 o'clock A. M., and you are notified to united therein, or failing to do so you will be made respondents.

Dated: July 27, 1914.

**PORTUGUESE AMERICAN BANK OF  
SAN FRANCISCO,**

(Signed) By JAMES B. FEEHAN,  
(Signed) GEO. A. KNIGHT,  
(Signed) CHAS. J. HEGGERTY,  
(Signed) JAMES B. FEEHAN,  
(Signed) JOSEPH W. BERETTA,

*Attorneys for Appellee, Portuguese-American Bank  
of San Francisco, a Corporation, Crocker Building,  
San Francisco, California.*

Receipt of a copy of the within Notice of Petition for Appeal and Severance this 27th day of July, 1914, is admitted.

(Signed) A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
MILTON J. GREEN,

*Solicitors for John Daniel, Trustee, etc., Appellant.*

(Signed) C. A. S. FROST,  
*Solicitor for Paul I. Welles, Appellant.*  
(Signed) EDWARD F. MORAN,  
*Solicitor for Thomas F. Boyle, Appellee.*

[Endorsed:] Notice of Petition for Appeal to Supreme Court  
U. S. and Severance. Filed Jul-29, 1914. F. D. Monekton, Clerk.



In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation),  
Appellee.

*Petition for Appeal [to Supreme Court U. S.].*

Your petitioner, Portuguese-American Bank of San Francisco (a corporation), appellee in the above entitled cause, conceiving itself aggrieved by the decree of the United States Circuit Court of Appeals for the Ninth Circuit, rendered therein and entered on the 9th day of March, 1914, reversing the decree of the District Court of the United States for the Northern District of California, First Division, hereby appeals from said decree of said United States Circuit Court of Appeals to the Supreme Court of the United States, and prays that its appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

The matter in controversy in the above entitled cause exceeds the sum of six thousand dollars besides costs, and said cause is one in which the jurisdiction and Judgment of the United States Circuit Court of Appeals is not made final.

That the above named appellants Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a corporation, Bankrupt, have refused to join in this appeal, and appellee Thomas F. Boyle has refused to join therein, and petitioner prays that after notice served upon them requiring them to join in this appeal, their interests may be severed from the interest of petitioner.

And desiring to supersede the execution of said decree petitioner here tenders bond in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

Dated July 27, 1914.

(Signed)  
(Signed)  
(Signed)  
(Signed)

GEO. A. KNIGHT,  
CHAS. J. HEGGERTY,  
JAMES B. FEEHAN,  
JOSEPH W. BERETTA,

*Solicitors for Appellee, Portuguese-American Bank  
of San Francisco, Crocker Building, San Francisco, Cal.*

Receipt of a copy of the within Petition for Appeal this 27th day of July, 1914, is admitted.

(Signed)

A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

*Solicitors for John Daniel, Trustee, etc., Appellant.*

(Signed)

C. A. S. FROST,

*Solicitor for Paul I. Welles, Appellant.*

(Signed)

EDWARD F. MORAN,

*Solicitor for Thomas F. Boyle, Appellee.*

[Endorsed:] Petition for Appeal to Supreme Court U. S. Filed Jul-29, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation), Appellee.

*Assignment of Errors.*

And, now, on this 27th day of July, 1914, comes Portuguese-American Bank of San Francisco (a corporation), appellee in the above entitled cause, and in connection with its petition for appeal herein, presents and files therewith its assignment of errors, as to which matters and things it says the decree entered herein by the United States Circuit Court of Appeals for the Ninth Circuit on the ninth day of March, 1914, is erroneous, to-wit:

First. That said Court erred in holding and deciding that the provisions in the specifications annexed to the contract known as "Contract No. 6-A," between Metropolis Construction Company and the Board of Public Works of the City and County of San Francisco, State of California, that the contractor "shall not, either legally or equitably, assign any if the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works," made void the assignment of the fourth progress payment by the said Company to the appellee, Portuguese-American Bank of San Francisco.

Second. That said Court erred in holding and deciding that the assignment of the fourth progress payment, made by the Metropolis Construction Company to appellee, Portuguese-American Bank of San Francisco, was void because the Board of Public Works of the City and County of San Francisco had not consented thereto.

Third. That said Court erred in holding and deciding that the provisions in said contract requiring the consent of the Board of Public Works applied to assignment for security.

Fourth. That said Court erred in holding and deciding that the provisions in said contract against assignment unless with consent of the Board of Public Works were for the purpose of protecting subcontractors in their equitable rights to unpaid funds in the hands of the City in case notice should be given under Sec. 1184, Code of Civil Procedure of California.

Fifth. That said Court erred in holding and deciding that appellee, Portuguese-American Bank of San Francisco, was not the assignee in good faith and for value of said fourth progress payment.

Sixth. That said Court erred in holding and deciding that the assignment without the consent of the Board of Public Works gave appellant, Paul I. Welles, equities in the fourth progress payment superior to those of the appellee.

Seventh. That said Court erred in holding and deciding that said assignment required the consent of the Board of Public Works.

Eighth. That said Court erred in holding and deciding that said assignment was not consented to by said Board of Public Works.

Ninth. That said Court erred in not holding and deciding that the assignment held by appellee was good and valid as against the claims of Paul I. Welles.

Tenth. That said Court erred in not holding and deciding that the provisions of said contract against assignment unless with consent of the Board of Public Works were inserted for the benefit of and could be invoked by the City and County of San Francisco only.

Eleven. That said Court erred in holding and deciding that Paul I. Welles was entitled to have a decree entered in his favor on the ground that appellee's assignment was void.

Twelfth. That said Court erred in reversing the decree of the District Court on the ground that appellee had not a good and valid assignment.

Thirteenth. That said Court erred in not affirming the decree of the District Court.

Fourteenth. That said Court erred in reversing the case on the ground that the consent of the Board of Public Works to the assignment had not been obtained, for the reason that said objection was not raised in the District Court, nor assigned as error in the United States Circuit Court of Appeals.

Fifteen. That said Court erred in not holding and deciding that the District Court of the United States for the Northern District of California, First Division, was without jurisdiction to hear or determine this suit, for the reason that this appellee had never consented but had expressly objected to the jurisdiction of said District Court.

Wherefore, Portuguese-American Bank of San Francisco, a corporation, prays that the decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed.

(Signed)

(Signed)

(Signed)

(Signed)

GEO. A. KNIGHT,

CHAS. J. HEGGERTY,

JAMES B. FEEHAN,

JOSEPH W. BERETTA,

*Solicitors for Portuguese-American Bank of  
S. F., Crocker Building, San Francisco, California.*

Receipt of a copy of the within Assignment of Errors this 27th day of July, 1914, is admitted:

(Signed)	A. F. MORRISON,
(Signed)	P. F. DUNNE,
(Signed)	W. I. BROBECK,
(Signed)	GAVIN McNAB,
(Signed)	B. M. AIKINS,
(Signed)	MILTON J. GREEN,
	<i>Solicitors for John Daniel, Trustee, etc., Appellant.</i>
(Signed)	C. A. S. FROST,
	<i>Solicitor for Paul I. Welles, Appellant.</i>
(Signed)	EDWARD F. MORAN,
	<i>Solicitor for Thomas F. Boyle, Appellee.</i>

[Endorsed:] Assignment of Errors. Filed Jul- 29, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation), Appellee.

*Order Allowing Appeal [to Supreme Court U. S.] and Severance [and Fixing Amount of Bond].*

Portuguese-American Bank of San Francisco, a corporation, appellee in the above entitled cause, having filed herein its petition for appeal to the Supreme Court of the United States from the decree of the United States Circuit Court of Appeals for the Ninth Circuit rendered therein on the 9th day of March, 1914, and mentioned in said petition for appeal, and having also filed herein its assignment of errors; and it appearing that written notice of said appeal and of the time and place of its presentation for allowance, was duly given to appellants Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a corporation, bankrupt, and to appellee Thomas F. Boyle, notifying them to join therein, or failing to do so they would be made respondents; and it further appearing that they have not joined in said appeal and have declined to join therein:

It is ordered, that said appeal be and the same is allowed, and that said Paul I. Welles, John Daniel, Trustee as aforesaid, and Thomas F. Boyle, may be made respondents.

Further ordered, that said appeal shall operate as a supersedeas of the decree appealed from upon said appellee Portuguese-American

Bank of San Francisco giving a bond in the sum of one thousand dollars, conditioned according to law.

Dated August 1", 1914.

(Signed)

WM. W. MORROW,  
*Judge of the Circuit Court of Appeals  
for the Ninth Circuit.*

[Endorsed:] Order allowing appeal to Supreme Court U. S., and severance, and fixing amount of bond. Filed Aug. 1, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation),  
Appellee.

*Bond on Appeal [to Supreme Court U. S. and Order of Approval].*

Know all men by these presents: That we, Portuguese-American Bank of San Francisco, a corporation, as principal and J. A. Silveira and Bernard Sherry, as sureties, are held and firmly bound unto Paul I. Welles, John Daniel, Trustee of Metropolis Construction Company, a Corporation, bankrupt, and Thomas F. Boyle, in the full and just sum of one thousand dollars, to be paid to the said Paul I. Welles, John Daniel, Trustee as aforesaid, and Thomas F. Boyle, their certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of August in the year of our Lord One Thousand, Nine Hundred and fourteen.

Whereas in a suit depending in the United States Circuit Court of Appeals for the Ninth Circuit, numbered 2273, wherein Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a corporation, bankrupt, were appellants, and Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle were appellees, a decree was rendered and entered by said Court on the 9th day of March, 1914, reversing the decree of the District Court of the United States for the Northern District of California, First Division, and ordering the entry of a decree for said appellant Welles, and whereas said Portuguese-American Bank of San Francisco, a corporation, having obtained an appeal to the Supreme Court of the United States to reverse the said decree of the United States Circuit Court of Appeals for the Ninth Circuit, and a citation directed to said Paul I. Welles, John Daniel, Trustee of Metropolis Construction Company, a corporation, bankrupt, and Thomas F. Boyle,



citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at Washington, in the District of Columbia, sixty days after the 1st day of August, 1914.

Now, the condition of the above obligation is such, that if the said Portuguese-American Bank of San Francisco, a corporation, shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

PORTUGUESE-AMERICAN BANK  
OF SAN FRANCISCO,

[SEAL.] (Signed) By J. A. SILVEIRA, *President.*

(Signed)

J. A. SILVEIRA.

[SEAL.]

(Signed)

BERNARD SHERRY.

[SEAL.]

Attest

M. T. BETTENCOURT,

*Asst Secretary Portuguese-*

*American Bank of San Francisco.*

UNITED STATES OF AMERICA,

*Northern District of California, ss:*

J. A. Silveira and Bernard Sherry being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and is worth the sum of one thousand Dollars, exclusive of property exempt from execution, and over and above debts and liabilities.

(Signed)

J. A. SILVEIRA.

(Signed)

BERNARD SHERRY.

Subscribed and sworn to before me this 1st day of August, 1914.

[SEAL.]

(Signed)

PAUL P. O'BRIEN,

*Deputy Clerk U. S. Circuit Court of*

*Appeals for the Ninth Circuit.*

The foregoing bond is approved this 1st day of August, 1914.

(Signed)

WM. W. MORROW,

*Judge of the United States Circuit Court*

*of Appeals for the Ninth Circuit.*

[Endorsed:] Bond on Appeal to Supreme Court U. S. and Order of Approval. Filed Aug. 1, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.  
No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,  
vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation),  
Appellee.

*Præcipe for Transcript on Appeal to Supreme Court of the United States.*

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

You are requested to make a Transcript of Record, to be filed in the Supreme Court of the United States, upon the appeal to said Court by the Portuguese-American Bank of San Francisco in the above entitled cause, and to include in said Transcript the following:

1. The printed Transcript of Record.
  2. The order of submission.
  3. The Supplemental Transcript of Record.
  4. The opinion filed March 9, 1914.
  5. The decree of reversal entered on said date.
  6. The opinion filed July 6, 1914, on Petition for a Rehearing.
  7. The Petition for Appeal.
  8. The Assignment of Errors.
  9. The notice of Petition for Appeal and Severance.
  10. The order allowing appeal and severance and granting supersedeas.
  11. The Bond on Appeal.
  13. The citation on appeal.
  14. Clerk's certificate.
- San Francisco, August 4, 1914.

(Signed)

GEO. A. KNIGHT,  
CHAS. J. HEGGERTY,  
JAMES B. FEEHAN,  
JOSEPH W. BERETTA,

*Solicitors for Portuguese-American Bank of S. F.*

Received a copy of the within Præcipe for Transcript on Appeal to Supreme Court of the United States this 5th day of August, 1914.

(Signed)

A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

*Solicitors for John Daniel, Trustee, etc.*

(Signed)

C. A. S. FROST,

*Solicitor for Paul I. Welles, Appellant.*

(Signed)

EDWARD F. MORAN,

*Solicitor for Thomas F. Boyle, Appellee.*

[Endorsed:] Præcipe for Transcript of Appeal to Supreme Court of the United States. Filed Aug. 5, 1914. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

*Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.*

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred and forty-five (345) pages, numbered from and including one (1) to and including three hundred and forty-five (345), to be a true copy of the complete record made pursuant to the præcipe filed by counsel for said appellee on the 5th day of August, A. D. 1914, under Rule 8 of the Supreme Court of the United States, in the above-entitled case, including the Assignment of Errors on Appeal to the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinions filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record on appeal to the Supreme Court of the United States in the above-entitled cause as made and certified pursuant to the said præcipe.

Attest my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this sixth day of August, A. D. 1914.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation), Appellee.

*Citation on Appeal.*

United States of America to Paul I. Welles, John Daniel, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, and to Thomas F. Boyle, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington,

in the District of Columbia, sixty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Portuguese-American Bank of San Francisco, (a corporation), is appellant, and you are respondents, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William W. Morrow, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 1st day of August A. D. 1914, and of the Independence of the United States, the one hundred and thirty ninth.

WM. W. MORROW,  
*Judge of the United States Circuit Court  
of Appeals for the Ninth Circuit.*

Received a copy of the within Citation on Appeal this first day of August, 1914.

A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,  
*Solicitors for John Daniel, Trustee, etc.*  
C. A. S. FROST,  
*Solicitor for Paul I. Welles.*  
EDWARD F. MORAN,  
*Solicitor for Thomas F. Boyle, Auditor, etc.*

[Endorsed:] Docketed. No. 2273. In the United States Circuit Court of Appeals for the Ninth Circuit. Paul I. Welles and John Daniel, Trustee, etc., Appellants, vs. Portuguese-American Bank of San Francisco, (a corporation). Citation on Appeal. Filed Aug. 5, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. Geo. A. Knight, Chas. J. Heggerty, Jas. B. Feehan, Jos. W. Beretta, Attorneys for Portuguese-American Bank of S. F. Crocker Building San Francisco.

Endorsed on cover: File No. 24,369. U. S. Circuit Court Appeals, 9th Circuit. Term No. 625. Portuguese-American Bank of San Francisco, appellant, vs. Paul I. Welles, John Daniel, trustee of Metropolis Construction Company, bankrupt, and Thomas F. Boyle. Filed September 19th, 1914. File No. 24,369.

# In the Supreme Court

of the  
United States

October Term, 1915

No. 45

PORTLAND AMERICAN BANK  
OF SAN FRANCISCO,

Appellant,

vs.  
PAUL L. WILLIAMS, JOHN DANIEL, Trustees of  
Metropolis Construction Company, Bankrupt,  
and THOMAS E. BOYD,

Appellees.

## BRIEF FOR APPELLANT.

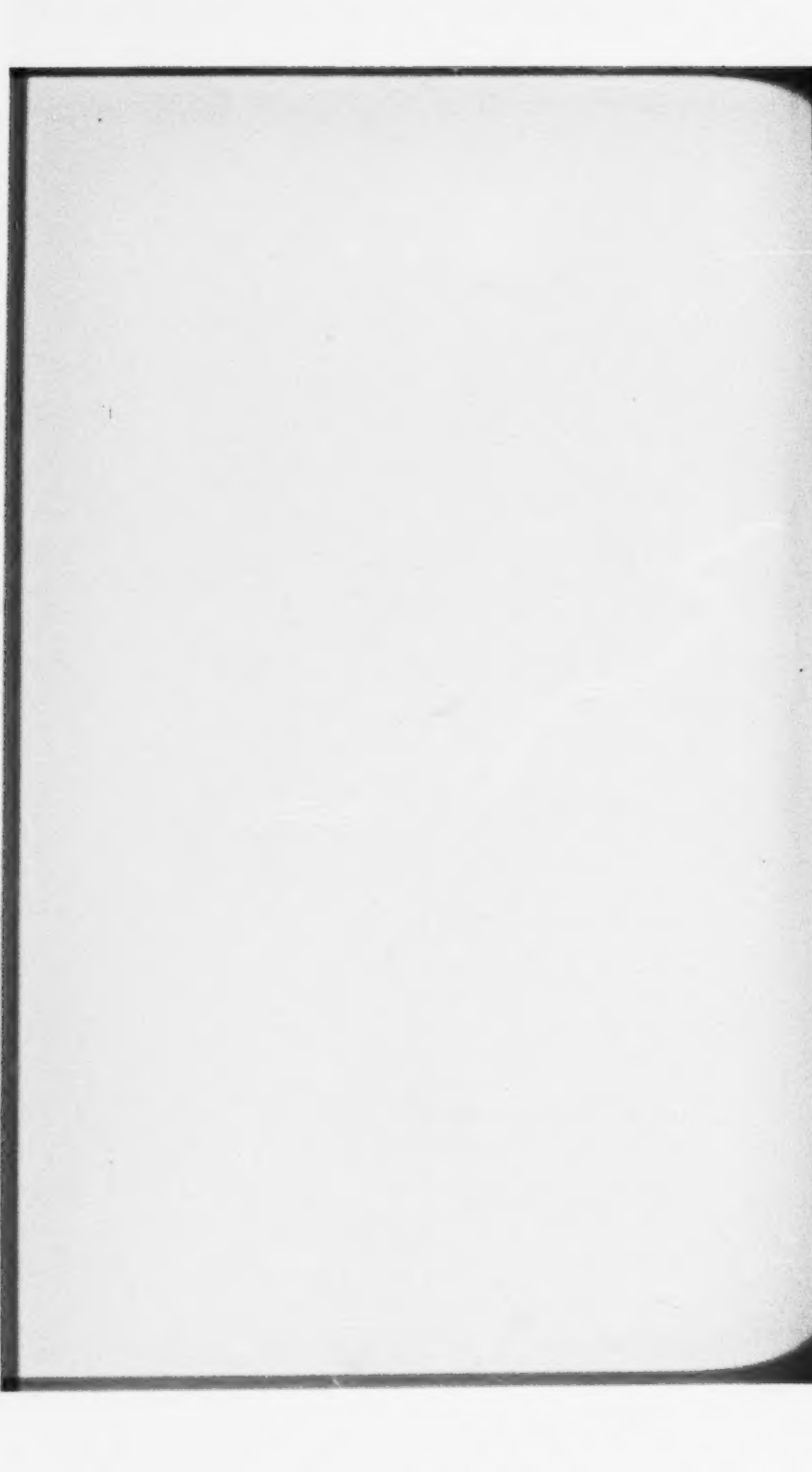
GEORGE A. KNIGHT,  
CHARLES J. HEDGECOCK,  
JAMES B. FREHAN,  
JOSEPH W. BRYANT,

Attorneys for Appellant.

Filed this \_\_\_\_\_ day of April, 1915.

JAMES D. MAHER, Clerk.





## Subject Index.

	Pages
<b>STATEMENT OF THE CASE:</b>	
Nature of the Case and Questions Involved.....	1
Statement of Facts.....	3
SPECIFICATION OF ERRORS.....	14
THE SUPREME COURT OF THE UNITED STATES HAS JURIS- DICTION TO HEAR THIS APPEAL.....	16

### ARGUMENT

CONTENTION OF APPELLEES BEFORE THE CIRCUIT COURT OF APPEALS .....	16
--	----

### POINT ONE. VALIDITY OF THE ASSIGNMENT

- A. THE PROVISION IN THE CONTRACT, THAT THE CONTRACTOR "SHALL NOT, EITHER LEGALLY OR EQUITABLY, ASSIGN ANY OF THE MONEYS PAYABLE UNDER THIS CONTRACT OR HIS CLAIM THERETO UNLESS WITH THE LIKE CONSENT OF THE BOARD OF PUBLIC WORKS", DID NOT MAKE NULL AND VOID AN ASSIGNMENT OF MONEYS EARNED BY THE CONTRACTOR, AND THEN ASSIGNED WITHOUT SUCH CONSENT.
- THIS PROVISION IS BUT A COVENANT INSERTED FOR THE SOLE BENEFIT AND PROTECTION OF THE CITY; AND THE CITY ALONE, OR THE BOARD OF PUBLIC WORKS, AS ITS AGENT CAN COMPLAIN OF A BREACH THEREOF..... 18

#### THE CASES RELIED UPON BY THE CIRCUIT COURT OF APPEALS DO NOT SUPPORT ITS DECISION.

- (a) The case of *Burck v. Taylor*, 152 U. S. 635, is mainly relied upon to support the decision of the Circuit Court of Appeals.

The case of *Burck v. Taylor* has not been understood. The facts involved were exceptional, and isolated extracts from the decision must be read in the light in which those facts appeared to Mr. Justice Brewer.

The conclusion of the Circuit Court of Appeals, and of other courts citing *Burck v. Taylor*, that the decision in the latter case holds an assignment of a contract in violation of a covenant requiring consent thereto null and void, is erroneous..... 18

The facts in <i>Burck v. Taylor</i> disclose the case of an attempted assignment by Schnell to Burek of an interest in a <i>public building contract</i> . While the contract was still wholly executory, while no part of the work had been done and no part of the profits earned, the State substituted Taylor in place of the assignor Schnell, with the latter's consent. Taylor performed the contract in ignorance of any outstanding assignment thereof to plaintiff, and after performance Burek sued for a share in the profits.....	19
Nowhere does Mr. Justice Brewer state that an assignment made in violation of a provision requiring consent is void.....	20
On the contrary, he states that if the assignor had ever made any profits, the assignee Burek would have acquired an interest in them under the assignment .....	23
He states further that Taylor carried out the contract, in ignorance of any assignment. The question of knowledge of Burek's claim would be entirely immaterial if the court regarded the assignment an absolute nullity.....	23
All that the court holds is, that the profits to be earned by performance of a contract cannot be disposed of by the contractor who performs no part of the work, so as to give his assignee an interest in them as against a substituted contractor who performs the whole contract in ignorance of the secret assignment.....	26
The case of <i>Burck v. Taylor</i> is not applicable to cases where there has been performance by the contractor and he has assigned his right to the money due to him in violation of a provision of the contract against assignment without consent..	27
<i>Fortunato v. Patten</i> , 147 N. Y. 277;	
<i>Hackett v. Campbell</i> , 10 N. Y. App. Div. 523.	

Pages

- (b) *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, is another case relied on by the Circuit Court of Appeals in support of the decision that the provision in the contract requiring consent made void the assignment to appellant.  
*Delaware County v. Diebold Safe Co.* does not support the decision of the Circuit Court of Appeals, as the point to which it is cited was not involved ..... 28
- The facts in the Delaware case were these:  
 The county made a single contract for the erection of a building, at a fixed gross price. The contractor assigned a part of the work and assumed to arbitrarily fix a certain sum as the compensation which the assignee should receive from the commissioners therefor.....29, 30  
 All that the court decided was that the contractor could not split up a single contract and fix the liability of the county without its consent..... 30
- (c) *Devlin v. Mayor of New York*, 63 N. Y. 8, is cited in support of a point which was not involved in that case, and the quotation therefrom is *obiter dicta* ..... 31
- The court in that case was referring to purely *executory* contracts.  
 A distinction is to be observed between contracts entirely executory and those which have been partly executed (*La Rue v. Groezinger*, 84 Cal. p. 289) ..... 32
- (d) *Suburban Electric L. Co. v. Hempstead*, 38 N. Y. App. Div. 355, is also cited to support the point that an assignment in violation of a *contract* provision requiring consent is void..... 33
- The case does not support that point.  
 The contract itself was void under the *statute*.... 33  
 The assignment of the contract was in contravention of a *statute*..... 34

The court decided, not that the assignment was void, but that the defendant was relieved of liability because the assignment violated the statute ..... 34

- (e) *City of Omaha v. Standard Oil Co.*, 55 Neb. 337, involved a provision restricting the assignment of the contract itself.

The suit was against the city.

The question of assignment of money earned was not involved; the court held that money to be earned was within the provision prohibiting assignment of the contract without consent.

- (f) *Murphy v. City of Plattsmouth*, 78 Neb. 163, was similar to and followed the case last mentioned.

All the above cases involved the rights of assignees of purely executory contracts. In all the cases (except *Burck v. Taylor*) the assignees sued the other contracting parties.

- (g) *Deffenbaugh v. Foster*, 40 Ind. 382, involved a point of pleading on demurrer.

The complainant, claiming as assignee of the original contractor, sued a property holder. His complaint did not allege assignment, with or without consent. The demurrer was sustained, and any statements of the court on the merits of the case were unnecessary to the decision..... 36

- (h) *Butler v. S. F. Gas & Electric Co.*, was at the time it was cited by the Circuit Court of Appeals, a decision of the District Court of Appeal of California, which was later reversed by the Supreme Court (168 Cal. 32). The Supreme Court refused to pass upon the validity of the subcontract and assignment.



AUTHORITIES SUPPORTING APPELLANT'S CONTENTION THAT  
THE PROVISION IS SOLELY FOR THE BENEFIT OF THE CITY.. 37

1. "AN ASSIGNMENT BY A CONTRACTOR AS SECURITY FOR A DEBT OF ALL MONEYS TO COME DUE TO HIM FROM A CITY, IS NOT RENDERED VOID BY A PROVISION IN THE CONTRACT AGAINST ASSIGNMENT, SUCH PROVISION THAT NEITHER THE CONTRACT NOR ANY OF THE MONEYS PAYABLE UNDER IT SHALL BE ASSIGNED WITHOUT THE CONSENT OF THE CITY IN WRITING, IS BUT FOR THE PROTECTION OF THE CITY AND CAN BE AVAILED OF ONLY BY THE CITY. A JUNIOR ASSIGNEE OF THE MONEYS CANNOT AVAIL HIMSELF OF THE PROVISIONS TO OBTAIN A MOST FAVORABLE POSITION IN THE ORDER OF PAYMENT."

*Jones, Pledges and Coll. Securities*, (3rd Ed.)  
p. 165, Sec. 136a.

This statement of the law is supported by the following cases involving contracts for public work:

*Fortunato v. Patten*, 147 N. Y. 277;  
*Hackett v. Campbell*, 10 N. Y. App. Div. 523;  
*Burnett v. Mayor and Alderman of Jersey City*, 31 N. J. Eq. 341;  
*Snyder v. City of New York*, 74 N. Y. App. Div. 421;  
*Episcopo v. City of New York*, 35 Misc. Rep. N. Y. 623; 80 N. Y. App. Div. 627; 176 N. Y. 572;  
*Staples v. City of Somerville*, 176 Mass. 237;  
*Board of Trustees v. Whalen*, 17 Mont. 1.

This statement is also supported by *Dillon on Mun. Corp.*, 5th Ed., Vol. 2, p. 1282..... 44  
Neither the City of San Francisco, nor any board, officer or agent thereof, has set up the defense of want of consent, nor made any claim to the moneys assigned to appellant..... 45  
Case squares with *Burnett v. Mayor*, supra..... 47

	Pages
2. PROVISIONS PROHIBITING ASSIGNMENT WITHOUT CONSENT ARE FREQUENTLY FOUND, ALSO, IN CONTRACTS OF LEASE, INSURANCE AND SALE; AND THE COURTS HAVE HELD THAT ASSIGNMENTS IN VIOLATION OF SUCH PROVISIONS ARE NOT VOID, BUT THAT SUCH PROVISIONS ARE SOLELY FOR THE BENEFIT OF THE PARTIES WHOSE CONSENT IS REQUIRED.....	47
CONTRACTS OF LEASE:	
(a) Such a provision is solely for the benefit of the lessor. <i>Randol v. Tatum</i> , 98 Cal. 390; <i>Webster v. Nichols</i> , 104 Ill. 160; 24 Cyc. 968.	
(b) Neither lease nor assignment is avoided by breach of provision requiring consent, in absence of re-entry under proper reservation. ....	48
<i>Den v. Post</i> , 1 Dutch. 289; <i>Hague v. Ahrens</i> , 53 Fed. Rep. 58; <i>Pennewell, In re</i> , 119 Fed. 139.	
(c) Rule. Assignment violating provision requiring consent passes the term; but if the lease provides for re-entry the lessor may end the term.....	50
(d) Principle applicable to all contracts.....	50
CONTRACTS OF INSURANCE:	
(a) Provision that the policy shall not be assigned without the consent of the insurer is for the latter's benefit, and no one else can complain of its breach.....	50
13 A. & E. Ency. of Law, 2nd Ed., 186, citing <i>Lienkauf v. Calman</i> , 110 N. Y. 50.	
(b) Such violation merely renders the policy liable to forfeiture.....	51
13 A. & E. Ency. of Law, 2nd Ed., 194, citing <i>Ill. Fire Ins. Co. v. Stanton</i> , 57 Ill. 354; <i>Hyatt v. Wait</i> , 37 Barb. (N. Y.) 29; <i>Benninghoff v. Agricultural Ins. Co.</i> , 93 N. Y. 495.	

CONTRACTS OF SALE:

- (a) Provision requiring seller's consent to the assignment of a contract of sale is for the benefit of the seller only..... 51  
*Wilson v. Reuter*, 29 Ia. 176.
  - (b) An assignee under an assignment in violation of such provision may enforce specific performance ..... 51  
*Sproull v. Miles*, 82 Ark. 455;  
*Grigg v. Landis*, 21 N. J. Eq. 494.
3. THE CIRCUIT COURT OF APPEALS HAS ERRED IN ASSUMING THAT THE PROVISION REQUIRING CONSENT MAY HAVE BEEN PLACED IN THE CONTRACT INVOLVED IN THE CASE AT BAR FOR THE PROTECTION OF LABORERS AND MATERIALMEN.
- (a) Unless the duty of providing for those persons is imposed by *statute*, municipalities owe them no duty ..... 52  
*Dillon on Mun. Corp.*, (5th Ed.) Sec. 831.  
 It is against public policy to give city authorities power to restrain assignment of moneys earned by a contractor..... 53
  - (b) The facts and evidence in this case force just the opposite conclusion, and leave no room for speculation as to the motive of placing this provision in the contract ..... 53  
 Sec. 1184, Civil Code of California, provides for right to give notice to withhold..... 53  
 Opinion of Judge Dietrich (Tr., p. 184), appellee amply protected, but neglectful..... 53  
 Act 2895, General Laws of California, requiring bond of \$17,000 to protect subcontractors, etc. .... 54  
 A bond of \$17,000 to protect subcontractors, etc., was given..... 55

	Pages
(d) Municipal corporations can exercise only granted, necessarily implied and indispensable powers .....	55
<i>Dillon, Municipal Corporations</i> , 5th Ed., Sec. 237;	
<i>Leslie v. Kite</i> , 192 Pa. St. 268.	
They have no power to provide new remedies, or to extend remedies already provided by the legislature, for subcontractors, laborers or materialmen on public work.....	55
<i>Leslie v. Kite</i> , 192 Pa. St. 268, 274.	
—	
APPELLEE WELLES HAS NO EQUITIES SUPERIOR TO APPELLANT'S .....	56
(a) Nature of his subcontract.....	56
(b) No notice of subcontract was filed, as required by the principal contract.....	56
(c) No notice to withhold was given until appellant had parted with its money.....	56
(d) Appellant's only security is the assignment, but Welles has the bond of \$17,000 for his protection	56
(e) It cannot be inferred that Welles has not received any of the bank's money.....	57
—	
B. MONEYS EARNED BY THE CONTRACTOR IN PERFORMANCE OF ITS CONTRACT, AND ORDERED PAID TO IT BY THE BOARD OF PUBLIC WORKS CONSTITUTE A DEBT DUE FROM THE CITY TO THE CONTRACTOR WHICH IS RIGHTFULLY THE SUBJECT OF FREE ALIENATION; AND IF THE EFFECT OF THE PROVISION IN THE CONTRACT, THAT THE CONTRACTOR "SHALL NOT, EITHER LEGALLY OR EQUITABLY, ASSIGN ANY OF THE MONEYS PAYABLE UNDER THIS CONTRACT OR HIS CLAIM THERETO UNLESS WITH THE LIKE CONSENT OF THE BOARD OF PUBLIC WORKS", IS TO RESTRICT THE FREEDOM OF ALIENATION OF CHOSES IN ACTION, IT IS TO THAT EXTENT VOID AS CONTRAVENING PUBLIC POLICY AND THE STATUTES OF THE STATE OF CALIFORNIA .....	57

The fourth progress payment was a chose in action against the city and in favor of the contractor when it was assigned to appellant, and the Circuit Court of Appeals erred in holding that the assignment thereof was avoided by reason of the violation of the contract provision against assignment without consent..	58
The Circuit Court of Appeals should have held that the attempted restriction on alienation was void....	58
Choses in action are freely assignable.....	58
<i>Sec. 954, Civil Code of California;</i>	
<i>Sec. 711, Civil Code of California;</i>	
<i>Meech v. Stoner</i> , 19 N. Y. 26;	
<i>Rued v. Cooper</i> , 109 Cal. 693;	
<i>Murray v. Green</i> , 64 Cal. 366.	
An illegal restraint on the freedom of alienation of choses in action is void unless a reversionary interest is reserved .....	59
<i>Bradley v. Peixotto</i> , 3 Ves. Jr. 324.	
A provision requiring consent to alienation is an illegal restraint and void.....	60
<i>Murray v. Green</i> , 64 Cal. 363;	
<i>Prey v. Stanley</i> , 110 Cal. 426.	
Provisions requiring consent to the assignment of choses in action are illegal restraints on alienation and void.	
<i>Alkan v. The New Hampshire Ins. Co.</i> , 53 Wis. 136 .....	60
<i>Spare v. Home Mutual Ins. Co.</i> , 17 Fed. Rep. 568 .....	61
<i>Courtney v. The N. Y. City Ins. Co.</i> , 28 Barb. (N. Y.) 116.....	62
<i>Roger Williams Ins. Co. v. Carrington</i> , 43 Mich. 252.....	62
<i>Maryland Casualty Co. v. Omaha E. L. &amp; P. Co.</i> , 157 Fed. 514.....	63
<i>Goit v. National Protection Ins. Co.</i> , 25 Barb. (N. Y.) 189.....	63
<i>West Branch Ins. Co. v. Helfenstein</i> , 40 Pa. St. 289 .....	64
<i>Pennebaker v. Tomlinson</i> , 1 Tenn. Ch. 598..	64



	Pages
<i>Carroll v. Charter Oak Ins. Co.</i> , 38 Barb. (N. Y.) 402.....	64
<i>Wood on Fire Insurance</i> , 2nd Ed., 758.....	65
<i>A. &amp; E. Encycl. of Law</i> , 2nd Ed., Vol. 13, p. 201 .....	65
The same construction has been placed on like provisions in contract for public works. When the contractor becomes entitled to payment he may freely assign his chose in action against the city.	
<i>Snyder v. City of New York</i> , 74 N. Y. App. Div. 421 .....	65
<i>Mellen v. Hampshire Ins. Co.</i> , 17 N. Y. 609..	66
When a contract has been completed, or a severable portion thereof, the contractor may sue on the contract, or in <i>indebitatus assumpsit</i> .....	67
<i>Dermott v. Jones</i> , 2 Wall. (U. S.) 1; 2 <i>Encl. Pl. &amp; Pr.</i> , 1009, and cases cited.	
Appellant can find no authority for the proposition that the alienation of money earned and payable can be restrained by contract.....	69
C. IT APPEARS FROM THE CONTRACT IN THIS CASE THAT IT WAS NOT THE INTENTION OF THE PARTIES THAT AN ASSIGNMENT OF MONEYS EARNED BY THE CONTRACTOR AND ORDERED PAID TO IT BY THE BOARD OF PUBLIC WORKS SHOULD BE VOID IF MADE IN VIOLATION OF THE PROVISION THAT "HE SHALL NOT, EITHER LEGALLY OR EQUITABLY, ASSIGN ANY OF THE MONEYS PAYABLE UNDER THIS CONTRACT OR HIS CLAIM THERETO UNLESS WITH THE LIKE CONSENT OF THE BOARD OF PUBLIC WORKS".	
The contract contains no provision declaring that an assignment without consent would be void.....	71
The contract provides remedies for breaches of its provisions, but provides no remedy affecting the validity of assignments or the rights of assignees....	71
In the absence of a provision declaring a forfeiture in case of breach of covenants the only remedy is an action for damages.....	73
<i>Hague v. Ahrens</i> , 53 Fed. 58;	
<i>Grigg v. Landis</i> , 21 N. J. Eq. 494.	

Pages

The position in the contract of the provision against assignment without consent, and context of that provision, show that it refers to the scheme of subletting the work under the contract, and relates solely to assignments of moneys to subcontractor.....	76
Provision applies only to moneys to be earned, a reasonable interpretation .....	81

POINT TWO. THE ASSIGNMENT.

THE DECREE OF THE CIRCUIT COURT OF APPEALS, WHILE BASED ON THE FOREGOING POINT ONE, CANNOT BE SUPPORTED ON THE GROUND THAT APPELLANT HAS NO ASSIGNMENT.

The facts in evidence establish four propositions:

1. The appellant had no intention of lending its money without security..... 81
2. The Metropolis Construction Co. did not intend or expect to obtain the loan without security..... 82
3. The security offered and accepted was the lawful subject of assignment ..... 82
4. The security was given and accepted for a present valuable consideration ..... 82

The intent of the parties is to be gleaned from conduct and circumstances. The proposition on one side was to borrow \$35,000, accompanied by an offer of security, and on the other an acceptance of the security accompanied by an advance of the money on the faith of it. This was a valid assignment.

*Fourth St. National Bank v. Yardley*, 165 U. S. 634;

*Mitchell v. Winslow*, 17 Fed. Cases p. 533 (opinion by Mr. Justice Story).

No particular mode or form is necessary to constitute an assignment.

*Story, Eq. Jurisprudence*, 13th Ed., Vol. 2, p. 366;  
4 Cyc., 137.

	Pages
An assignment may be inferred from conduct.	
<i>4 Cyc.</i> , 43;	
<i>McIntyre v. Hauser</i> , 131 Cal. 11.	
No notice of the assignment need be given.	
<i>2 A. &amp; E. Ency. Law</i> , 2nd Ed., 1076.....	84
Under the laws of California appellant has a legal assign- ment .....	85
<i>Curtin v. Kowalsky</i> , 145 Cal. p. 434;	
(Refers to certain California code sections).....	85
<i>Gilman v. Curtis</i> , 66 Cal. 116;	
<i>Widaman v. Hubbard</i> , 88 Fed. p. 812;	
Sections 954, 1045, 1052, 1140, 1158 and 1624,	
<i>Civil Code of California</i> .	
The nature of the assignment is a question of California law .....	86
<i>Butcher v. Cheshire R. R. Co.</i> , 125 U. S. 583;	
<i>Rose, Code of Federal Procedure</i> , Vol. 1, Sec. 10,	
Notes (a), (aa) and (b).	
Transfer, the word used in the Civil Code of California, includes assignment .....	87
<i>Cross v. Savings Bank</i> , 66 Cal. 466;	
<i>Curtin v. Kowalsky</i> , <i>supra</i> .	
When the intent to transfer title appears, the intent pre- vails and title passes. No notice or writing is necessary.	
<i>Civil Code of California</i> , Sec. 1052, <i>supra</i> ;	
<i>Curtin v. Kowalsky</i> , 145 Cal. 431;	
<i>McIntyre v. Hauser</i> , 131 Cal. 14;	
<i>Smith v. Peck</i> , 128 Cal. 530;	
<i>Lawrence etc. Bank v. Kowalsky</i> , 105 Cal. 43;	
<i>Renton etc. Co. v. Monnier</i> , 77 Cal. 457;	
<i>Spain v. Hamilton's Adm's</i> , 1 Wall. 604;	
<i>4 Cyc.</i> , 7, 37, 43;	
<i>9 Cyc.</i> , 588.	
Upon passage of title the assignor is divested of all right to control .....	89
<i>Gilman v. Curtis</i> , 66 Cal. 116;	
<i>McIntyre v. Hauser</i> , 131 Cal. 14.	
The party who owns the demand is entitled to payment..	90
<i>Scheerer v. Edgar</i> , 76 Cal. 569.	

POINT THREE. PRIORITY.

THE CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE CLAIMS OF THE BANK WERE SUPERIOR TO THOSE OF WELLES UNDER SECTION 1184 OF THE CODE OF CIVIL PROCEDURE OF CALIFORNIA.....	90
A notice to withhold under said Sec. 1184 is in the nature of a garnishment.....	92
<i>Newport Wharf &amp; Lumber Co. v. Drew</i> , 125 Cal. 585, at 589;	
<i>Bates v. Santa Barbara Co.</i> , 90 Cal. 543, at 546;	
<i>Bianchi v. Hughes</i> , 124 Cal. 24, at 27;	
<i>Butler v. Ng Chung</i> , 160 Cal. 435, at 439;	
<i>Diamond Match Co. v. Silberstein</i> , 165 Cal. 282, 288.	
A notice to withhold cannot affect moneys which had become due to the contractor, and which were then assigned by him, prior to its service on the city.....	92
<i>First Nat Bk. v. Perris I. Dist.</i> , 107 Cal. 55, at 62;	
<i>Newport Wharf &amp; Lumber Co. v. Drew</i> , 125 Cal. 585, at 589;	
<i>Long Beach School Dist. v. Lutge</i> , 129 Cal. 409, at 413;	
27 <i>Cyc.</i> , 231, 232;	
<i>Spengler v. Styles-Tull Lumber Co.</i> , (Mias.) 48 So. 966, at 973.	
In this case the money was due to the contractor prior to the assignment to appellant, and was assigned to appellant before the notice to withhold was served.....	93
<i>Charter of San Francisco</i> , Chap. I, Art. IV, Secs. 22, 11.....	93
There is a wide distinction between the debt and the demand or warrant.....	93
The contract was between the board of public works and the Metropolis Construction Company. The Charter and contract provide that the work is to be done under the direction and to the satisfaction of the board of public works .....	94

	Pages
The money became due upon the engineer's estimate (Dec. 3, 1910), and approval of the work by the board of public works (Dec. 5, 1910).....	95
<i>Moore v. Kerr</i> , 65 Cal. 519, at 521; cited with approval in	
<i>American-Hawaiian Eng. Co. v. Butler</i> , 165 Cal. 457, at p. 513;	
<i>California Sugar Agency v. Penoyer</i> , 167 Cal. 274, at p. 279.	
The estimate and approval fixed the city's obligation to pay .....	97
Delay in payment of the debt is purely a matter of routine, and has no bearing on the obligation to pay....	98
<i>Political Code of California</i> , sections 672 and 433;	
<i>Newport Co. v. Drew</i> , <i>supra</i> .	
Under the Charter the board of public works is the body to make the contract and fix the city's obligation to pay.	101
Auditing and approval of other officers and boards are intended for the protection of the city and its taxpayers.	
Opinion of Hon. Franklin K. Lane (while City Attorney of San Francisco).....	102

#### POINT FOUR. LAW OF THE CASE.

THIS PURELY TECHNICAL OBJECTION WAS RAISED BY APPELLEES, BUT WAS NOT NOTICED BY THE CIRCUIT COURT OF APPEALS.

The contention that a memorandum of opinion and clerk's minute order thereof made by the District Court during the pendency of the suit, and before the bank had answered to the merits, were conclusive of the law of the case and fixed the right of Welles to a final decree on the merits, cannot be sustained.

Only question raised by appellant at that time was of the court's jurisdiction .....	103
The record before the court at that time, did not include answer of bank, and the opinion and order were made upon the hearing of an order to show cause and returns thereto .....	104

The formal order which was entered on the opinion gave appropriate relief, and did not fix Welles' right to a final decree in his favor.	
The last formal order was signed by the judge, and was the final action of the court.....	104
<i>Estate of Cook</i> , 77 Cal. 227;	
<i>Byrne v. Hoag</i> , 116 Cal. 1;	
<i>O'Brien v. O'Brien</i> , 124 Cal. 422;	
<i>Belger v. Sanchez</i> , 137 Cal. 618.	
Law of the case applies only to decisions of appellate tribunals. <i>Nisi prius</i> courts may, at any time, change their opinions and rulings until an appealable order is entered .....	105
<i>Lawrence v. Ballou</i> , 37 Cal. 521.	
The final decree entered, not the opinion of the court, is the ruling on matters adjudged.....	105
<i>De La Beckwith v. Superior Court</i> , 146 Cal. 499.	
No final decree was ever made or entered until the submission of the case, more than a year after the memorandum opinion was given when a decree was ordered in favor of appellant. The doctrine of <i>res adjudicata</i> has no application .....	106
<i>Freeman on Judgments</i> , (4th Ed.) Sec. 251.	
No principles were announced in the memorandum opinion, and case cited by appellee Welles is not in point....	106
But principles announced by a court of <i>nisi prius</i> do not bind its action on final hearing.....	107
<i>Rodgers v. Pitt et al.</i> , 129 Fed. 932;	
<i>High on Injunctions</i> (4th Ed.), Sec. 5;	
<i>Andrae v. Redfield</i> , 12 Blatchf., p. 425.	
At the time the memorandum opinion was given Welles' bill of complaint merely sought an accounting.....	107
The prayer was amended more than four months after the rendition of that opinion to include specific relief....	108
This contention of appellee Welles was overruled in the District Court, both by the judge, who rendered the opinion, and by his successor.....	108



	Pages
<i>First Nat. Bank v. Perris, I. Dist.</i> , 107 Cal. 55.....	92, 99
<i>Fortunato v. Patten</i> , 147 N. Y. 277.....	27, 38
<i>Fourth St. National Bank v. Yardley</i> , 165 U. S. 634....	82, 88
<i>Gilman v. Curtis</i> , 66 Cal. 116.....	86, 89
<i>Goit v. National Protection Ins. Co.</i> , 25 Barb. (N. Y.) 189 .....	63
<i>Grigg v. Landis</i> , 21 N. J. Eq. 494.....	51, 75
<i>Hackett v. Campbell</i> , 10 N. Y. App. Div. 523.....	27, 39
<i>Hague v. Ahrens</i> , 53 Fed. Rep. 58.....	49, 73-75
<i>Hewitt v. Berlin Machine Works</i> , 194 U. S. 296.....	16
<i>Hobbs v. Head &amp; Dowst Co.</i> , 231 U. S. 692.....	16
<i>Houghton v. Burden</i> , 228 U. S. 161.....	16
<i>Huntington v. Saunders</i> , 163 U. S. 319.....	16
<i>Hyatt v. Wait</i> , 37 Barb. (N. Y.) 29.....	51
<i>Illinois F. Ins. v. Stanton</i> , 57 Ill. 354.....	51
<i>Knapp v. Milwaukee Trust Co.</i> , 216 U. S. 545.....	16
<i>LaRue v. Groezinger</i> , 84 Cal. 281.....	32
<i>Lawrence v. Ballou</i> , 37 Cal. 521.....	105
<i>Lawrence etc. Bank v. Kowalsky</i> , 105 Cal. 43.....	89
<i>Leslie v. Kite</i> , 192 Pa. St. 268.....	55, 56
<i>Lienkauf v. Calman</i> , 110 N. Y. 50.....	50
<i>Loewe v. Federation of Labor</i> , 189 Fed. 714.....	106
<i>Long Beach School Dist. v. Lutge</i> , 129 Cal. 409.....	92
<i>McIntyre v. Hauser</i> , 131 Cal. 11.....	84, 89
<i>Meech v. Stoner</i> , 19 N. Y. 26.....	59
<i>Maryland Casualty Co. v. Omaha E. L. &amp; P. Co.</i> , 157 Fed. 514 .....	63
<i>Mellen v. Hampshire Ins. Co.</i> , 17 N. Y. 609.....	66
<i>Mitchell v. Winslow</i> , 17 Fed. Cases 533.....	83
<i>Moore v. Kerr</i> , 65 Cal. 519.....	95
<i>Murphy v. City of Plattsburgh</i> , 78 Neb. 163.....	18, 35
<i>Murray v. Green</i> , 64 Cal. 363.....	59, 60
<i>Newport Wharf &amp; Lumber Co. v. Drew</i> , 125 Cal. 585 .....	58, 70, 92, 96, 97, 99, 100

# INDEX

iii

	Pages
<i>O'Brien v. O'Brien</i> , 124 Cal. 422.....	105
<i>Pennebaker v. Tomlinson</i> , 1 Tenn. Ch. 598.....	64
<i>Pennewell</i> , In re, 119 Fed. 139.....	49
<i>Philadelphia v. Lockhardt</i> , 72 Pa. 211.....	31
<i>Prey v. Stanley</i> , 110 Cal. 426.....	60
<i>Randol v. Tatum</i> , 98 Cal. 390.....	47, 48
<i>Renton etc. Co. v. Monnier</i> , 77 Cal. 457.....	89
<i>Rodgers v. Pitt</i> , 129 Fed. 932.....	107
<i>Roger Williams Ins. Co. v. Carrington</i> , 43 Mich. 252....	61
<i>Rued v. Cooper</i> , 109 Cal. 693.....	59
<i>Scheerer v. Edgar</i> , 76 Cal. 569.....	90
<i>Smith v. Peck</i> , 128 Cal. 530.....	89
<i>Snyder v. City of New York</i> , 74 N. Y. App. Div. 421..	41, 65, 69
<i>Spain v. Hamilton's Adm's.</i> , 1 Wall. 604.....	89
<i>Spare v. Home Mutual Ins. Co.</i> , 17 Fed. Rep. 568.....	61
<i>Spengler v. Stiles-Tull Lumber Co.</i> , (Miss.) 48 So. 966..	92
<i>Sproull v. Miles</i> , 82 Ark. 455.....	51
<i>Staples v. City of Somerville</i> , 176 Mass. 237.....	43
<i>Suburban Electric Light Co. v. Town of Hempstead</i> , 38 N. Y. App. Div. 355.....	33, 34
<i>Webster v. Nichols</i> , 104 Ill. 160.....	48
<i>West Branch Ins. Co. v. Helfenstein</i> , 40 Pa. St. 289....	64
<i>Widaman v. Hubbard</i> , 88 Fed. Rep. 812.....	86
<i>Wilson v. Reuter</i> , 29 Ia. 176.....	51

## Index to Text Books.

	Pages
A. & E. Encycl. of Law, 2nd Ed., Vol. 2, p. 1076....	84
A. & E. Encycl. of Law, 2nd Ed., Vol. 13, p. 186....	50
A. & E. Encycl. of Law, 2nd Ed., Vol. 13, p. 194....	51
A. & E. Encycl. of Law, 2nd Ed., Vol. 13, p. 201....	65
A. & E. Encycl. of Law, 2nd Ed., Vol. 18, p. 369....	49
Cyc., Vol. 4, p. 7 .....	89
Cyc., Vol. 4, p. 37 .....	84, 89
Cyc., Vol. 4, p. 43 .....	84, 89
Cyc., Vol. 9, p. 588 .....	89
Cyc., Vol. 24, p. 968 .....	50
Cyc., Vol. 27, pp. 231, 232 .....	92
Dillon, Municipal Corporations, 5th Ed., Sec. 237 .....	55
Dillon, Municipal Corporations, 5th Ed., Vol. 2, Sec. 831...	52
Dillon, Municipal Corporations, 5th Ed., Vol. 2, Sec. 832...	52
Dillon, Municipal Corporations, 5th Ed., Vol. 2, p. 1282 ...	44
Encyc. Pl. & Pr., Vol. 2, p. 1009.....	68
Freeman on Judgments, 4th Ed., Sec. 251.....	106
High on Injunctions, 4th Ed., Sec. 5.....	107
Jones, Pledges and Coll. Securities, 3d Ed., p. 143, Sec. 136a .....	37
Lane, Franklin K., Opinions of, as City Attorney of San Francisco .....	102
Rose, Code Federal Procedure, Vol. I, Sec. 10, Notes (a), (aa) and (b).....	87
Story, Equity Jurisprudence, 13th Ed., Vol. 2, p. 366....	84
Wood on Fire Insurance, 2nd Ed., 758.....	65

## Statutes and Code Sections Cited.

Civil Code of California, Sec. 711.....	59
Civil Code of California, Sec. 954.....	58, 87
Civil Code of California, Sec. 1045.....	87
Civil Code of California, Sec. 1052.....	87, 89
Civil Code of California, Sec. 1140.....	87
Civil Code of California, Sec. 1458.....	87
Civil Code of California, Sec. 1624.....	87
Code of Civil Procedure of California, Sec. 1184.....	12, 53

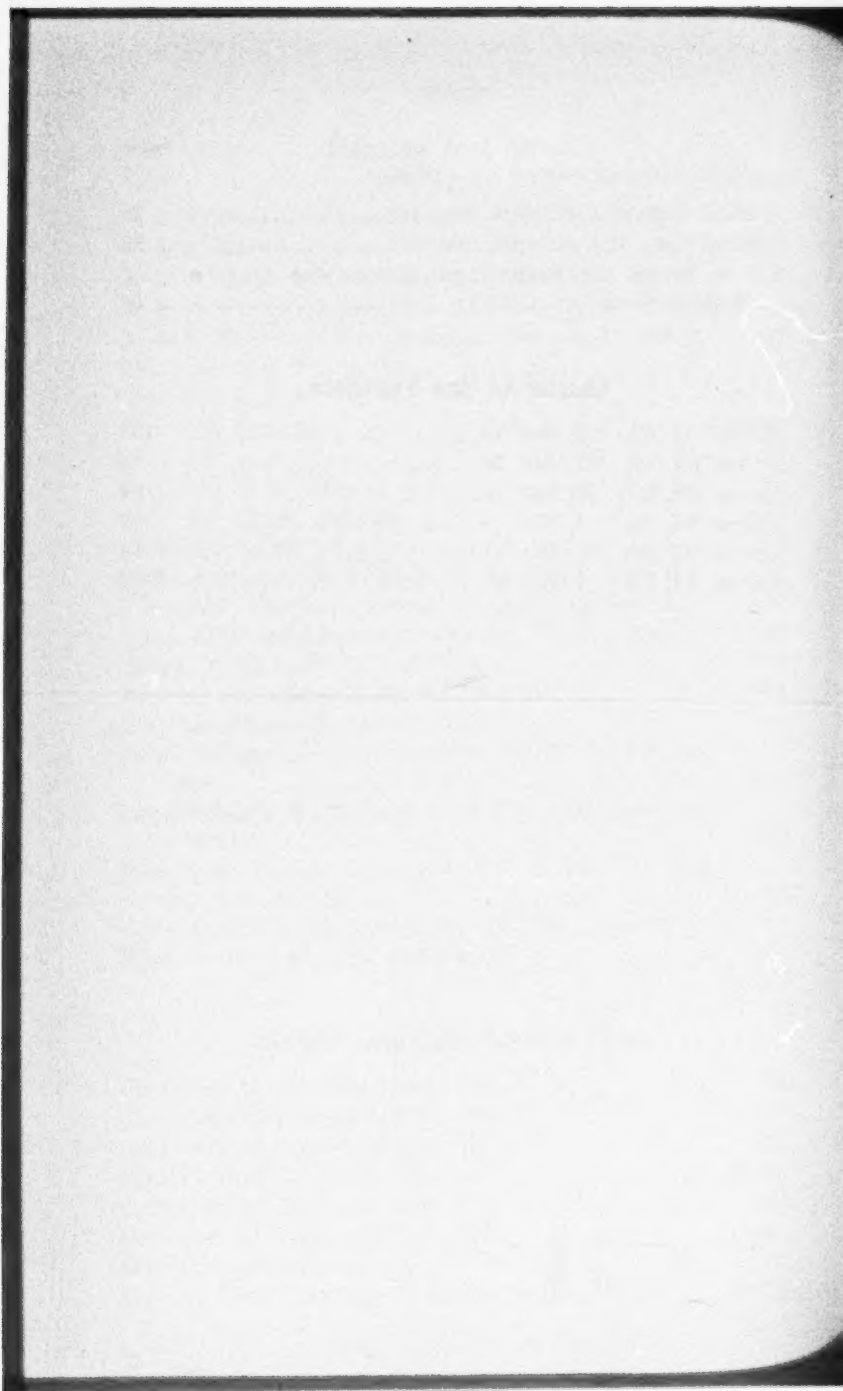
## Pages

## Statutes and Code Sections Cited (Cont.):

Political Code of California, Sec. 433.....	98
Political Code of California, Sec. 672.....	98
Act to Secure the Payment of Materialmen etc., on Public Work .....	54

### Charter of San Francisco.

Article II, Ch. I, Sec. 19.....	101
Article III, Ch. III, Sec. 13.....	94
Article IV, Ch. II, Sec. 7.....	94
Article VI, Ch. I, Sec. 9.....	7
Article VI, Ch. I, Sec. 11.....	7, 93
Article VI, Ch. I, Sec. 22.....	7, 93



# In the Supreme Court

OF THE  
United States

---

OCTOBER TERM, 1915

No. 248

---

PORTUGUESE-AMERICAN BANK  
OF SAN FRANCISCO,

*Appellant,*

vs.

PAUL I. WELLES, JOHN DANIEL, Trustee of  
Metropolis Construction Company, Bankrupt,  
and THOMAS F. BOYLE,

*Appellees.*

---

## BRIEF FOR APPELLANT.

---

### Statement of the Case.

---

#### Nature of the Case and Questions Involved.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, entered March 9, 1914, reversing a decree rendered by the United States District Court for the Northern District of California, First Division,



in favor of appellant Portuguese-American Bank of San Francisco, and directing that a decree be entered for appellee Welles.

The suit arose out of a controversy about the right to the demand or warrant for a fourth progressive payment of \$6,830.85, *already* earned by the Metropolis Construction Company and ordered paid by the board of public works under a sewer construction contract with the board of public works of San Francisco. Appellant claims under an assignment made to it by the Metropolis Construction Company as security for loans of \$35,000.00. Appellee Welles claims as a subcontractor asserting a claim in the nature of a *garnishment* acquired by giving a notice under the provisions of Section 1184 of the Code of Civil Procedure of California. Appellee Daniel, as trustee of the bankrupt Metropolis Construction Company, unites in the claim of Welles. Appellee Boyle was and is auditor of the City and County of San Francisco, and makes no claim on either his own behalf, or on behalf of the city.

The cause was referred to a special referee and examiner on April 15, 1912, to find the facts and his conclusions of law therefrom, and he found in favor of appellant on all the issues, and that appellant was entitled to the demand. Exceptions of appellees Welles and Daniel to this report were overruled by the District Court on January 18, 1913, and a decree in favor of appellant was thereafter signed.

From this decree of the District Court Paul I. Welles and John Daniel, trustee, appealed to the Circuit Court of Appeals; that court held that appellant's rights were prior to those of Welles if it had a valid assignment of the fund. On this point, however, it reversed the decree of the lower court on the ground that the sewer construction contract provided that the contractor should not assign any of the moneys payable under the contract or his claim thereto, without the consent of the board of public works, and that, as such consent had not been obtained to the assignment in question, the failure to obtain it rendered the assignment *absolutely void*. In so holding and deciding, appellant contends that the Circuit Court of Appeals erred.

---

### Statement of Facts.

(Note: The facts in this case were found by the referee on two references. One report was filed October 14, 1911 (p. 92 Tr.), and the other, July 16, 1912 (p. 132 Tr.). On the hearing pursuant to the second order of reference counsel for appellee Welles offered in evidence without objection the first report, filed October 14, 1911 (p. 263 Tr.), and stipulated that all the testimony taken, and exhibits introduced on the former hearing, might be considered as evidence on the final hearing, but should not be used to change the findings of fact as made (pp. 266, 267 Tr.). The cause was submitted on the record as it stood and the same facts were found (p. 132 Tr.). The facts found by the referee are, therefore, not disputed deductions from conflicting evidence.)

On July 22, 1910, the board of public works of the City and County of San Francisco, under and by virtue of the authority granted to it as such by

Article VI of the Charter of the City and County of San Francisco, entered into a written contract with the Metropolis Construction Company, a corporation, for the construction of a sewer and appurtenances in Kentucky and Fourth streets, in said City and County, for the estimated sum of \$33,182.00. The contract provides that the work will be done under the direction and to the satisfaction of said board of public works, and also provides that payments were to be made as the work progressed, called "progressive" or "progress" payments, as provided in the specifications accompanying the contract, which, are, in part, as follows:

**"PAYMENTS.**

In order to assist the contractor to prosecute the work advantageously, the city engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

The first estimate shall be of the value of the labor done and materials incorporated into the herein proposed work since the contractor commenced the performance of the contract on his part and every subsequent estimate except the final estimate shall be of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be made, when in the judgment of the city engineer the total value of the labor done and materials incorporated into the herein proposed work since the last preceding estimate amounts to less than \$5,000.00. Such estimates need not be made by strict measurements but they may be approximate only and shall be based upon the whole

amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said city engineer's estimate.

Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the city engineer, the contract is not complying with the requirement of the contract and specifications." (p. 135 Tr.)

The specifications annexed to the contract and referred to in the contract contain the following provisions:

"SUB-CONTRACTS. The contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof without the consent or authorization of the board of public works.

With his request to the board of public works for permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together with such other information as will enable the board of public works to determine the responsibility and standing of said sub-contractor.

No sub-contractor will be considered unless the original contract between the contractor and the board of public works is made a part thereof, nor unless it appears to the board of public works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sublet, and to complete said work in accordance with these specifications and to the satisfaction of the board of public works.

No sub-contract shall relieve the contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the board of public works." (p. 136 Tr.)

On or about July 30, 1910, the contract was sublet to Paul I. Welles by the company, but there was never any formal consent by the board of public works thereto (p. 137 Tr.). But Mr. Welles acted on the job with the knowledge of the board. Under the subcontract the company agreed to pay Welles 90 per cent of the moneys to be received by it from the city under its said contract. The company proceeded with the work under the contract, through its subcontractor, Mr. Welles, until bankruptcy proceedings. After that the work was completed by Mr. Welles under receivers and trustee in bankruptcy.

The following portions of the provisions of the Charter of San Francisco, found in Chapter I of Article VI, relate to contracts of this kind:

"Sec. 9. The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the supervisors:

\* \* \* \*

2. Of all sewers, drains and cesspools, and of the work pertaining thereto or to the drainage of the city and county;

\* \* \* \*

7. Of any and all wires and conduits, the collection and disposal of street refuse, garbage and sewage, and the designing, construction and maintenance of the sewerage and drainage systems of the city and county"; (p. 270 Tr.)

"Sec. 11. Said board shall appoint a civil engineer of not less than five years' practical experience as such, who shall be designated the city engineer. He shall hold his office at the pleasure of the board.

He shall perform all the civil engineering and surveying required in the prosecution of the public works and improvements done under the direction and supervision of said board, and shall certify to the progress and completion of the same, and do such other surveying or other work as he may be directed to do by said board or by the supervisors. \* \* \*

\* \* \* \*

"Sec. 22. The work in this article provided for must be done under the direction and to the satisfaction of the board of public works; and the materials used must be in accordance with the specifications and be to the satisfaction of said board, and all contracts provided for in this article must contain a provision to that effect, and also, that in no case, except where it is otherwise provided in this Charter will the city and county, or any department or officer thereof, be liable for any portion of the expense, or in the case of improvement of streets,



for any delinquency of persons or property assessed.

When said work shall have been completed to the satisfaction and acceptance of the board, it shall so declare by resolution, and thereupon the board shall deliver to the contractor a certificate to that effect." (p. 270 Tr.)

It was stipulated that the Charter of the City and County of San Francisco may be deemed to have been admitted in evidence and may be used in argument (pp. 269, 270 Tr.).

On December 3, 1910, the said engineer made his fourth estimate of progressive work under the contract (pp. 138 and 217, 218 Tr.), which estimate was approved by the board of public works on December 5, 1910. On the latter day the board of public works, by its resolution, authorized a fourth progress payment of \$6,830.85, to be made to the Metropolis Construction Company (pp. 138 and 256, 257 Tr.). On the same day a demand for that sum was presented by the Metropolis Construction Company to, and approved by, the board of public works, and was forwarded to the board of supervisors of said city and county for approval (pp. 96, 138, 213, 214 Tr.). This approval was given on January 3, 1911, and that of the mayor of the city on January 4, 1911 (p. 145 Tr.).

On December 5, 1910, after the fourth progress payment had been authorized, Chris Emille, who was then the president and general manager of the Metropolis Construction Company, accompanied by L. F. Strong, its assistant secretary, went to the

Portuguese-American Bank for the purpose of obtaining a loan of \$30,000, and offered as security to assign to the bank certain demands on the treasury of the City and County of San Francisco in favor of the company, and the moneys represented thereby aggregating about \$38,000. The security so offered was an order on the auditor of the city and county as follows:

“San Francisco, Cal., December 5, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County  
of San Francisco.

Dear Sir:—

You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco, is hereby authorized and empowered to draw the warrants in favor of the undersigned against City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

1st:—Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth streets Sewers, the contract being between the undersigned and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$2,173.17 being fourth progressive payment on account of contract between the undersigned and said City and County dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20, being fourth progressive payment on account of contract between the undersigned and said City and County dated June 22nd, 1910, and

being for construction of sewer in 7th Street,  
Howard to Hubbell Streets under contract No.  
31.

METROPOLIS CONSTRUCTION  
COMPANY, INC.

By Chris Emille,  
President.

By L. F. String,  
Ass't Secretary.

(Seal of Metropolis Construction Co.)  
Received Auditor's Office Dec. 6, 1910.  
Ans. H. J."  
(pp. 138, 139, Tr.)

The first warrant mentioned in said order for the fourth progressive payment on said contract for sewers and appurtenances in Kentucky and Fourth Streets is the demand involved in this suit (p. 140 Tr.).

With this order the officers of the company presented certified copies of three resolutions of the board of public works, one of which was the resolution allowing the company the sum of \$6,830.85 as the fourth progress payment under the contract (p. 140 Tr.). *This resolution has never been revoked* (p. 140 Tr.).

Before making the loan the bank required that this order be presented to the auditor's office for acceptance. Complying with this requirement the officers of the company delivered a copy of the order to the auditor and had the original stamped "Received Auditor's Office Dec. 6, 1910. Ans. H. J." (p. 141 Tr.).

The original order bearing this stamp was then presented to the bank and on December 6, 1910, the bank loaned the company the sum of \$30,000, taking the order as security for the company's note (p. 141 Tr.).

When he delivered this order to the bank, together with the copies of the resolutions, Chris Emille, the president and general manager of the company, intended that it should be a complete assignment of the full amount of the three warrants set forth therein (p. 141 Tr.).

On the next day, December 7, 1910, at the request of the company, the bank loaned to it an additional sum of \$5000.00 to pay labor on the same security, and the company delivered its second note to the bank for said amount (pp. 141-142 Tr.).

This money, \$35,000, was placed to the credit of the company by the bank and was drawn out by the company by checks, excepting the sum of \$1.06 (p. 142 Tr.). No part of this money so drawn out has been repaid (p. 142 Tr.).

At the time these loans were made no notice had been given or filed by the appellee Welles requiring the city to hold back money to pay him on his subcontract, nor was his subcontract, or any notice thereof, filed with the board of public works, but on December 12 and 16, 1910, appellee Welles, acting under Section 1184 of the Code of Civil Procedure of the State of California (Edition of 1909), served notice on the city to withhold the

money due or to become due to the company (pp. 149, 150 Tr.). The portion of Section 1184 of the Code of Civil Procedure relating to this matter is as follows:

“\* \* \* Any of the persons mentioned in section eleven hundred and eighty-three, except the contractor, may at any time give to the reputed owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished or both.

Such notice may be given by delivering the same to the reputed owner personally, or by leaving it at his residence or place of business, with some person in charge, or by delivering it to his architects, or by leaving it at their residence or place of business, with some person in charge, or by posting it in a conspicuous place upon the mining claim or improvement.

No such notice shall be invalid by reason of any defect of form, provided it is sufficient to inform the reputed owner of the substantial matters herein provided for, or to put him upon inquiry as to such matters.

Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person, to answer

such claim and any lien that may be filed therefor for record under this chapter, including counsel fees not exceeding one hundred dollars, in each case, besides reasonable costs provided for in this chapter."

Thereafter and on December 19, 1910, a petition in involuntary bankruptcy was filed against the company, and on January 5, 1911, it was adjudged a bankrupt. On February 1, 1911, John Daniel was appointed trustee of the bankrupt company.

Owing to the conflicting claims made upon him, Thomas F. Boyle, auditor of the City and County of San Francisco, refused to audit or deliver the demands and on January 26, 1911, the bank filed suit in the Superior Court of the City and County of San Francisco, State of California, against said auditor to compel him to audit and deliver to it the possession of said demands. While the suit was pending and on April 18, 1911, appellee Welles filed the present suit in equity in the United States District Court for the Northern District of California, First Division, against the bank, the trustee in bankruptcy and Auditor Boyle.

On December 26, 1911, the case was referred to a special referee and examiner on final hearing to hear the testimony and proofs and find the facts on the issues arising on the pleadings and to report his findings and conclusions to the court (pp. 119, 120 Tr.).

On July 16, 1912, the special referee and examiner filed his finding of facts and conclusions of law,



finding that the fourth progress payment was assigned to the bank, and that the assignment and the right of the bank to receive the proceeds thereof, were not affected by the notice to withhold made by Welles. This report of the referee is to be found on pages 132 to 172 of the transcript.

Thereafter and on January 18, 1913, the District Court made and entered its order confirming the report of the special referee and examiner and directing a decree for the appellant bank (p. 185 Tr.) and on January 30, 1913, the decree in favor of appellant was signed by the judge (p. 186 Tr.).

---

### Specification of Errors.

The decree of the Circuit Court of Appeals herein is erroneous in the following particulars:

1. The court erred in holding and deciding that the provisions in the specifications annexed to the contract known as "Contract No. 6-A," between Metropolis Construction Company and the board of public works of the City and County of San Francisco, State of California, that the contractor "shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the board of public works," made void the assignment of the fourth progress payment by the said company to the Portuguese-American Bank of San Francisco.

2. The court erred in holding and deciding that the provisions in said contract against assignment, unless with consent of the board of public works, were for the purpose of protecting subcontractors in their equitable rights to unpaid funds in the hands of the city in case notice should be given under Section 1184, Code of Civil Procedure of California.

3. The court erred in holding and deciding that the Portuguese-American Bank of San Francisco was not the assignee of said fourth progress payment.

4. The court erred in holding and deciding that said assignment required the consent of the board of public works.

5. The court erred in not holding and deciding that the assignment held by the Portuguese-American Bank was good and valid as against the claims of Paul I. Welles.

6. The court erred in not holding and deciding that the provisions of said contract against assignment unless with consent of the board of public works were inserted for the benefit of, and could be invoked by, the City and County of San Francisco only.

7. The court erred in not affirming the decree of the District Court.

8. The court erred in reversing the decree of the District Court.

### Jurisdiction.

This appeal is taken under Section 241 of the Judicial Code, approved March 3, 1911, in effect January 1, 1912, re-enacting the final clause of Section 6 of the Act of March 3, 1891.

*Hewit v. Berlin Machine Works*, 194 U. S. 296;

*Huntington v. Saunders*, 163 U. S. 319;

*Knapp v. Milwaukee Trust Co.*, 216 U. S. 545;

*Houghton v. Burden*, 228 U. S. 161;

*Hobbs v. Head & Dowst Co.*, 231 U. S. 692.

---

### ARGUMENT.

Appellees urged the following points in the Circuit Court of Appeals:

First. That the assignment to the appellant bank was null and void because made in violation of the provision in the contract requiring consent of the board of public works.

Second. That the facts found were not sufficient to sustain the bank's claim of assignment.

Third. That appellee Welles was entitled to priority by virtue of his notice to withhold under Section 1184 of the Code of Civil Procedure of California.

Fourth. That a certain "memorandum opinion" and minute order of December 12, 1911, made on the hearing of an order to show cause prior to the filing of the bank's answer and the argument and submission of the cause on its merits, was conclusive as the law of the case and fixed the right of Welles to a decree in his favor in the absence of changed findings of fact on final hearing.

In its opinion the Circuit Court of Appeals considers and disposes of the first and third points only. No reference is made to the second and fourth points.

Appellant is unable to ascertain whether appellees will confine their argument to the first point, on which the Circuit Court of Appeals reversed the decree of the District Court, or will endeavor to support the decree of the Circuit Court of Appeals upon some ground other than that stated in its opinion, and for that reason deems it advisable to consider in this brief all the points urged before the lower court.

In the presentation of its argument, appellant will first take up the point on which the Circuit Court of Appeals based its decree of reversal.

**Point One. Validity of the Assignment.**

**A.**

**THE PROVISION IN THE CONTRACT THAT THE CONTRACTOR "SHALL NOT, EITHER LEGALLY OR EQUITABLY, ASSIGN ANY OF THE MONEYS PAYABLE UNDER THIS CONTRACT OR HIS CLAIM THERETO UNLESS WITH THE LIKE CONSENT OF THE BOARD OF PUBLIC WORKS", DID NOT MAKE NULL AND VOID AN ASSIGNMENT OF MONEYS EARNED BY THE CONTRACTOR, AND THEN ASSIGNED WITHOUT SUCH CONSENT.**

**THIS PROVISION IS BUT A COVENANT INSERTED FOR THE SOLE BENEFIT AND PROTECTION OF THE CITY; AND THE CITY ALONE, OR THE BOARD OF PUBLIC WORKS, AS ITS AGENT, CAN COMPLAIN OF A BREACH THEREOF.**

The case of *Burck v. Taylor*, 152 U. S. 635, is mainly relied upon in the opinion of the Circuit Court of Appeals to support the conclusion that an assignment by the contractor of money earned by him in performance of his contract, and allowed by the proper officials as a progress payment, is void if made without the consent of those officials where the contract provides that the contractor shall not assign moneys payable under the contract unless with their consent, and that its invalidity can be asserted by a junior claimant against the senior assignee.

Several other cases, especially *City of Omaha v. Standard Oil Co.*, 55 Neb. 337, and *Murphy v. City of Plattsmouth*, 78 Neb. 163, are also cited in support of the above proposition. These cases were all prosecuted against the contracting party *whose consent had not been obtained*, and involved con-

tracts *executory on both sides*. Several of these cases rely upon *Burck v. Taylor* as an authority supporting the conclusion that an assignment of *any contract* without the consent of the other contracting party is void if the contract contains a provision requiring such consent. The case of *Burck v. Taylor* does not so decide.

The opinion in *Burck v. Taylor*, as applied to the facts then before this court, does not announce the rule contended for; and an erroneous construction has been placed upon the language used, due to the fact that *portions* of the opinion are quoted as stating general principles of law, applicable to all contracts, when those statements were in fact limited and explained by the peculiar nature of the case under consideration.

In that case the plaintiff sought to recover from the defendant \$231,470 alleged to be his share of the profits of a contract made by the State of Texas for the erection of its capitol building.

The State of Texas executed a contract with one Schnell for the erection of this building, a clause (the 26th) of which is as follows:

“It is further agreed, covenanted and stipulated by the party of the second part that this contract shall not be assigned, in whole or in part, by the party of the second part without the consent in writing of the party of the first part signed by the governor of Texas and the capitol building commissioners, with the advice and consent of the heads of departments.”



Plaintiff claimed under an agreement entered into before the work was done between Schnell and plaintiff's predecessor, which purported to assign to the latter an interest in the contract. The consent of the State to this assignment was not given.

Defendant is the assignee of Schnell and others of the entire contract. The assignment to him had the consent of the State and he "furnished all the means and did all the work of building the capitol" and he had no knowledge of any claim of the plaintiff.

The court decided that under the circumstances Burek acquired no rights against Taylor.

There is *no* statement in the opinion that the assignment to plaintiff was void.

That decision cannot be correctly apprehended by reading isolated extracts from it, and in view of the misapprehension as to what was decided we respectfully urge that it be carefully examined, and in the light in which the facts appeared to Mr. Justice Brewer. He states:

"That which arrests the attention is that, though the defendant furnished all the means and did all the work of building the capitol, and although the authorities of the state expressly recognized him as the contractor, bound in all respects to carry out the contract with the state in the same manner as the original contractor, and though he had no knowledge of any claim of plaintiff, the court is asked to recognize the latter as the owner of one thirty-second of the profits of the contract, and to compel the defendant to pay him that amount.

While only one thirty-second of the profits is asked for, the rule would be the same if thirty-one thirty-seconds were sued for, and the first and principal question which arises is, whether these transactions between Schnell and A. A. Burck and between A. A. Burck and plaintiff had, without the knowledge of the defendant, operated to create in the plaintiff a valid claim to a share of the profits. The contract in its twenty-sixth clause stipulated that there should be no assignment in whole or in part by the contractor without the consent in writing of the state authorities. No such consent was given to the assignment by Schnell to Burck, nor does it appear that the state ever in any form recognized the plaintiff, or his immediate grantor, as having any interest in, or control of, the contract, or any part thereof. He was to both the state and the defendant, who did the work, an unknown party until after the full completion of the contract, when for the first time he appears claiming an interest in the profits by virtue of an assignment and transfer, made before the work was done and in disregard to the terms of the contract."

On page 650, he states:

"By the three instruments of January 31, May 9, and June 20, 1882, this contract was wholly transferred to and accepted by the defendant. This was while the contract was executory and before the work was done, and these transfers were with the written consent and approval of the state authorities, and by them the state in terms recognized 'Abner Taylor as the contractor, bound in all respects to carry out the contract with the state of Texas in like manner as the original contractor, Matthias Schnell, was bound.' In other words, by the consent of parties, and in accordance with express provisions of the contract, before

the work was done Abner Taylor, the defendant, was substituted for Schnell as the contractor. It was precisely the same as though the contract with Schnell had been surrendered and a new one made with Taylor. The contract was still executory; nothing had been earned by Schnell, and nothing was due to him. He steps out of the contract and Taylor steps in; Taylor is accepted as the contractor and proceeds with the work. Would it not be strange if, after having thus completed the contract, some person could, on the strength of an unknown transfer to the entire profits of the contract made before the transfer to Taylor, compel the latter to pay to him such entire profits? And yet if one thirty-second of the entire profits can be so obtained, all the profits could, in like manner have been obtained."

It is true that Mr. Justice Brewer states that the contract was unassignable without consent, because of the contract provision requiring consent, but this merely means it was unassignable in the same sense that a lease is said to be unassignable, without consent of the landlord, if there is a provision in it requiring consent, and still it is well settled that an assignment of a lease in violation of such a provision is not void.

The effect of the unassignability of the contract was not that the assignment would be *void*, but that the assignment would give the assignee no right to take part in the work if the State objected or to require the State to deal with him or *to interfere with the State's right with consent of Schnell to substitute another for Schnell*.

That he did not decide that Burck's assignment was *void* is shown by the statement of Mr. Justice Brewer, page 652:

"All that could ever have been acquired by an assignment or transfer by Schnell, without the consent of the state, was a right to maintain an independent action against him for whatever share of the profits he had attempted to transfer. But that obligation would be personal to Schnell, and was not assumed by the defendant  
\* \* \*"

Here the court holds that if Schnell made profits the assignment would operate to give Burck a right to them. The assignment therefore *was not void*. If the assignment was *void* the action would not be for the *profits*.

Mr. Justice Brewer also states, page 653:

"we have thus far considered this case on the assumption that the defendant proceeded with the completion of his contract in ignorance of any transfer to plaintiff."

He then proceeds in opinion to show that Taylor had no notice of Burck's right.

If Burck's assignment was void, it would be entirely immaterial whether Taylor had notice of it or not.

The Circuit Court of Appeals quotes the following from *Burck v. Taylor*:

"It may be conceded that, primarily, it was a provision intended, although not expressed, for the benefit of the state, and to protect it from interference by other parties in the performance of the contract, to secure the constant

and sole service of a contractor with whom the state was willing to deal and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interests in the contract it had no previous knowledge, and to the acquisition of whose interests it had not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him."

and therefrom draws the conclusion that clauses in contracts prohibiting assignment without consent are *not* for the benefit of the contracting parties only and that any one may take advantage of them.

This conclusion is obviously erroneous. The court holds, *not* that the assignment without consent was *null and void*; not that the provision was not for the benefit of the State; *but* that after it was made the State, under the terms of its contract, had accepted Taylor as the contractor in place of Schnell and with Schnell's consent; that Schnell was bound by this substitution, and that all who dealt with him were equally bound thereby.

Clause 26, in effect, reserved to the State the right, with Schnell's permission, to substitute another in his place to carry on the contract.

That this conclusion is erroneous will appear when it is considered that in making this statement, Mr. Justice Brewer had under consideration the argument of plaintiff's counsel, of which he states, (p. 646):

"It is earnestly insisted by counsel that this provision forbidding an assignment without the written consent of the state authorities, was solely for the benefit and protection of the State; that it did not restrict or interfere with the right of the contractor to dispose, in any way he saw fit, of an interest in the contract, or the profits thereof, so long as the party to whom such transfer was made attempted no interference with the actual work, and presented no claim against the State. The contract in the possession of the contractor was his property, and the profits arising therefrom, and any interest therein, were as much the subject of disposal as any other property, and the only limitation was one for the benefit of the state and could not be claimed by any subsequent assignee from the contractor."

If the above contention of Burck's counsel was correct, then the State, when it made its contract with Schnell, would be at his mercy in securing a capital, for if the profits of the contract were property, subject to disposal the same as any other property, then Schnell as soon as the contract was awarded to him could secretly assign the profits and divest himself of the benefits to be derived by performance. Then he could assign the contract to another who would be accepted by the State and who would perform it. After the latter had earned the money by full performance, then the first assignee would come in and take the profits.

Obviously, if such a doctrine prevailed it would be impossible for the State to deal with an assignee in any event, and as impossible for any assignee with the State's consent to perform the contract



with assurance of receiving any of the compensation.

A *purely executory contract*, as this court points out in *Burck v. Taylor*, page 653, is composed of benefits and obligations, and the benefits cannot be separated from the obligations as a coupon from a bond and sent floating through the channels of commerce. The contractor is bound to perform his obligations, and only upon performance does he become entitled to the benefits. So long as he fails to perform, he gets no claims under his contract, and his assignees stand in his shoes.

Hence, it plainly appears that the decision in *Burck v. Taylor* does not proceed upon the theory advanced by the Circuit Court of Appeals in this case. Nor does it support the *dicta* in the Nebraska cases to which the Circuit Court of Appeals refers. We use the word *dicta* advisedly, because in those cases, and in all the cases cited by the appellees and the court, the suits were brought by assignees against the *party whose consent was required*, and who set up the lack of consent in defense. In some cases the assignees recovered, in others they failed; but in none of these cases was it *necessary* to decide that the assignment was *void* in the strict sense, and there is nothing in the opinions to show in what sense the courts used the word.

Such assignments may be *unenforceable* against the debtor who sees fit to invoke the defense. But it is to be remembered that in this case the City of San Francisco makes no defense,—is merely a

*stakeholder*,—as appellees allege; that Welles claims no interest in the contract, but is a creditor of the contractor and has given the city notice to withhold money due the contractor under Section 1184 of the Code of Civil Procedure of California; that appellee Daniel claims as trustee in bankruptcy.

Even if *Burck v. Taylor* does decide that an assignment of an *executory contract* in violation of a provision restricting assignment is void, it would not support appellee's contention that the assignment of the moneys already earned (a debt due from the city) is void.

The cases of *Fortunato v. Patten*, 147 N. Y. 277, and *Hackett v. Campbell*, 10 A. D. N. Y. 523, had under consideration *Burck v. Taylor*, and they decided it was not applicable to cases in which the restriction against assignment related to the payments due under municipal contracts.

In *Hackett v. Campbell*, at page 525, the court states:

“The appeal is based upon the provision of the contract quoted, the appellants' contention being that it forbids any assignment of moneys earned under the contract and effectually prevents the respondent's order from operating as an equitable assignment. To sustain their contention the appellants cite *Burck v. Taylor* (152 U. S. 634). We think the rule there applied has no application to the case before us. In *Fortunato v. Patten* (147 N. Y. 277) the Court of Appeals of this State decided that a similar provision in a contract with the city of

New York was inserted solely for the benefit of the city, and that its sole function was to prevent any claim being asserted against the city in the absence of its consent.

The court there distinguished between a provision forbidding the assignment of money due under a contract and one forbidding the assignment of the contract itself. The case of *Burck v. Taylor* (*supra*) was of the latter character. The case before us was of the first. The provision in the contract with Campbell was that no portion of the amount due on the contract should be assigned without the consent of the committee of the board of education, and the case cannot be distinguished in this respect from that of *Fortunato v. Patten*."

We do not dispute that *the parties* to a contract may insert a provision against assignment, but we deny that such a provision has ever been given the effect contended for by appellees.

The quotation by the Circuit Court of Appeals from *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 488 (p. 316 Tr.), does not support the appellees. It refers to a contract under which the promisee had to perform something before earning money and in which *no element of personal confidence* is involved. This is shown by a fuller quotation, which is as follows:

"A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of

personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract including both his rights and his obligations cannot be assigned without the consent of the other party to the original contract."

The latter portion of this quotation from the opinion by Mr. Justice Gray, is of the utmost importance, as it shows upon what facts his mind was dwelling at the time. The case did not involve the question of the right of the contractor to *money earned by him and which the county was bound to pay*, but the right of a subcontractor under a subcontract made by the contractor, without the county's consent, to make a claim against the county under a subcontract to which it had never agreed. The case involved propriety of instructions to the jury, in which no question of consent was submitted. The court holds that a *single executory contract* cannot be parted into *various fragments*, without the *consent of the debtor*. The court states that the statutes of Indiana and judicial expositions of them by the Supreme Court of the State are *inconsistent* with the theory that the contractor may split up and assign different portions of *one entire contract*. The following quotation from this case contains the gist of the decision:

"The original contract of the county commissioners was for the construction by Meyers & Son of the building as a whole by a certain date; for the payment to them by the Commissioners of a gross sum of \$20,000 for such construction, upon an accounting with them from

time to time; and for the payment by the contractors of twenty-five dollars, as liquidated damages, for every day that the building should remain unfinished beyond that date.

The assignment was not in the nature of a mere order for the payment of a sum of money, but it was of that part of the contract which related to the iron work, and required the assignee to perform this part of the work, and assumed to fix at the sum of \$7,700 the compensation for this part, which the assignee should receive from the Commissioners. There is nothing, either in the original contract, or in the evidence introduced at the trial, to show what proportion the iron work bore to the rest of the work requisite for the construction and completion of the jail, or that any separate estimate of the cost or value of the iron work was contemplated by the original contract, or ever made by the defendant, or by any officer or agent of the County."

Meyers & Co. did not assume to pay the subcontractor, but he was to look solely to the commissioners.

The court further states that the subcontract which Meyers & Son made with plaintiff "assumed to compel the commissioners to pay the plaintiff" \$7,700, with "no provision for damages for delay, and thus undertook to fix a different measure of compensation from the original contract."

The court further says that its decision is in harmony with, because distinguishable from the cases cited by plaintiff. Some of these cases involved the assignment of a *fund* and not of any *obligation to perform work*; others the assignment of *entire con-*

*tracts* involving no personal confidence. Referring to the case of *Philadelphia v. Lockhardt*, 73 Pa. 211, 216, the court says that

“There was no controversy as to the performance of the work, or as to the amount to be paid, but only as to the person entitled to receive payment; the court treating the assignment as one of money only, held the assignee entitled to recover against the city.”

In such cases, the court says it was held that mere notice of the assignment, without proof of consent, was held sufficient, but where there was a partial assignment of a contract the consent of the debtor is required, “because ‘the policy of the law is against permitting individuals, by their private contracts, to embarrass the financial affairs of a municipality’ ”. For this reason the court held that the question of consent should have been submitted to the jury.

We find nothing in that case to support the decision of the Circuit Court of Appeals, in the case at bar, that the assignment of a *fund earned* by the contractor is *void*, because made without the consent of the debtor.

Likewise, the statement in the case of *Devlin v. Mayor of N. Y.*, 63 N. Y. 8, quoted by the Circuit Court of Appeals, that

“Parties may in terms prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations”,



the reason that Williamson had assigned the contract to the plaintiff without the consent of the board.

One of the contentions of the defendant is stated to be that "both the contract and the assignment of it are invalid, under 'An act to prohibit the assignment and subletting of public contracts' " (Chapter 444, Laws 1897). Section 1 reads:

"A clause shall be inserted in all specifications or contracts hereafter made or awarded by the state, or by any county, or any municipal corporation, or any public department or official thereof, prohibiting any contractor, to whom any contract shall be let, granted or awarded, as required by law, from assigning, transferring, conveying, subletting or otherwise disposing of the same, or of his right, title or interest therein, or his power to execute such contract to any other person, company or corporation, without the previous consent in writing of the department or official awarding the same."

Section 2 provides that if any such contractor shall, without such assent of the corporation, "assign, transfer, convey, sublet or otherwise dispose of the same, or his right, title or interest therein, or his power to execute such contract, to any other person, company or other corporation," the municipal corporation "shall revoke and annul such contract," and be relieved thereby from all liability and obligation thereunder to the assignee.

The court states:

"As the complaint alleges that Williamson assigned the contract to the plaintiff corporation, we are not called upon to decide anything

further in this regard, except that, the assignment being without the consent of the town board, the defendant is 'relieved and discharged from any and all liability and obligations growing out of said contract' to the plaintiff."

The court also states that plaintiff's "only claim is made under a contract originally void, and even that attempted to be illegally assigned, in contravention of the statute."

This case does not consider the effect of the *contract provision* and it does not decide that the assignment is *void*, but merely *that the town is relieved* from liability growing out of the contract, because, firstly, the *contract* was void; and, secondly, because the *assignment* was in *contravention of the statute*.

The case of *City of Omaha v. Standard Oil Co.*, 55 Neb. 337, concerns a contract in which there was a clause prohibiting the assignment of the contract without consent. This case holds that an assignment without consent of moneys *to be earned* under the contract is a violation of such a clause and that the assignee cannot compel the *city* to pay.

The case of *Murphy v. City of Plattsmouth*, 78 Neb. 163, is somewhat similar to the *City of Omaha* case and follows it.

*In all of the above cases cited by the Circuit Court of Appeals, the assignees sought to enforce their claims against the other party to the contract who set up the defense of lack of consent. And all of*

these cases concern the *assignment of executory contracts before performance*.

The case of *Deffenbaugh v. Foster*, 40 Ind. 382, also referred to, involved merely a point of pleading. The assignee sued to enforce a lien for street improvement, but failed to aver in his complaint the *fact of assignment either with or without consent*. The point was raised on demurrer that the title of the plaintiff did not appear. The demurrer was sustained, and the ruling was affirmed on appeal. Any statement of the court on the merits of the case was unnecessary to the decision. In this case the court also stated that the provision was for the *protection of the city and property-owner* against improper and unfaithful substitutes for the original contractor. While this was also dictum it shows that when the court used the word *void*, it did not necessarily mean absolute nullity, since on its view of the case the infirmity was equally available to Foster as a defense whether the assignment was void or voidable.

In this connection we wish to refer briefly to the case of *Butler v. San Francisco Gas & Electric Co.*, cited by the Circuit Court of Appeals (p. 321 Tr.).

The decision in that case, at the time it was used as an authority, was rendered by the District Court of Appeal of California, which *affirmed* the judgment appealed from. The case was afterwards taken to the Supreme Court of California, where the judgment appealed from was *reversed*.

The contract in that case provided that no assignment of the contract should be made by the contractor, nor any portion of the work sublet by him to any subcontractor without the consent of defendant. The contract was sublet to plaintiff without consent and the latter performed the contract. After the work was done the contractor also assigned to plaintiff the money earned but not yet paid. The Superior Court and District Court of Appeal held the subcontract and assignment of money absolutely void. The Supreme Court, on transfer from the District Court, reversed the judgment of the lower court on the ground that the assignment of the moneys earned was not an assignment of the contract. The Supreme Court expressly refused to pass upon the question as to the nature or effect of the subcontract by the contractor to plaintiff on the ground that it was not necessary to the disposal of the case.

*Butler v. San Francisco Gas & Electric Co.,*  
168 Cal. 32.

The cases now to be considered are authorities *directly* bearing on the point, and *all of them support the contention of appellant*, that lack of consent does not make the assignment void.

A correct statement of the law is found in *Jones, Pledges and Coll. Securities* (3rd Ed.), p. 143, Sec. 136a, as follows:

"An assignment by a contractor as security for a debt of all moneys to become due to him from a City, is not rendered void by a provision

these cases concern the *assignment of executory contracts before performance.*

The case of *Deffenbaugh v. Foster*, 40 Ind. 382, also referred to, involved merely a point of pleading. The assignee sued to enforce a lien for street improvement, but failed to aver in his complaint the *fact of assignment either with or without consent.* The point was raised on demurrer that the title of the plaintiff did not appear. The demurrer was sustained, and the ruling was affirmed on appeal. Any statement of the court on the merits of the case was unnecessary to the decision. In this case the court also stated that the provision was for the *protection of the city and property-owner* against improper and unfaithful substitutes for the original contractor. While this was also dictum it shows that when the court used the word *void*, it did not necessarily mean absolute nullity, since on its view of the case the infirmity was equally available to Foster as a defense whether the assignment was void or voidable.

In this connection we wish to refer briefly to the case of *Butler v. San Francisco Gas & Electric Co.*, cited by the Circuit Court of Appeals (p. 321 Tr.).

The decision in that case, at the time it was used as an authority, was rendered by the District Court of Appeal of California, which *affirmed* the judgment appealed from. The case was afterwards taken to the Supreme Court of California, where the judgment appealed from was *reversed*.

The contract in that case provided that no assignment of the contract should be made by the contractor, nor any portion of the work sublet by him to any subcontractor without the consent of defendant. The contract was sublet to plaintiff without consent and the latter performed the contract. After the work was done the contractor also assigned to plaintiff the money earned but not yet paid. The Superior Court and District Court of Appeal held the subcontract and assignment of money absolutely void. The Supreme Court, on transfer from the District Court, reversed the judgment of the lower court on the ground that the assignment of the moneys earned was not an assignment of the contract. The Supreme Court expressly refused to pass upon the question as to the nature or effect of the subcontract by the contractor to plaintiff on the ground that it was not necessary to the disposal of the case.

*Butler v. San Francisco Gas & Electric Co.*,  
168 Cal. 32.

The cases now to be considered are authorities *directly* bearing on the point, and *all of them support the contention of appellant*, that lack of consent does not make the assignment void.

A correct statement of the law is found in *Jones, Pledges and Coll. Securities* (3rd Ed.), p. 143, Sec. 136a, as follows:

"An assignment by a contractor as security for a debt of all moneys to become due to him from a City, is not rendered void by a provision



in the contract against assignment, such provision that neither the contract nor any of the moneys payable under it shall be assigned without the consent of the City in writing, is but for the protection of the City and can be availed of only by the City. A junior assignee of the moneys cannot avail himself of the provisions to obtain a more favorable position in the order of payment."

This statement is supported by the following cases:

A case which has been cited with approval in many decisions is that of *Fortunato v. Patten*, 147 N. Y. 277. The facts involved are set forth in 5 Misc. Rep. (N. Y.) 234, and are, shortly, as follows: One Dawson entered into a contract with officials of the City of New York for the performance of some public work. The contract, provided that the contractor would *not assign any of the moneys payable to him*, except with previous consent of the commissioner of public works endorsed thereon, and that *no rights in the contract or to the moneys payable thereunder should be asserted* by any assignee whose assignment was not so authorized. The lower court held that an assignment made in violation of this provision was ineffectual as well in law as in equity, as against a subsequent assignment made with consent. These assignments were made *before the money was earned* by the contractor. The court said that the case might have been different had the *money been earned before assignment* thereof.

The Court of Appeals of New York, on appeal, reversed the decision of the lower court, and held that the provision against assignment of moneys without the consent of the commissioner *did not make void* an assignment without such consent. It was further held that *Burck v. Taylor*, (152 U. S. 634) had no application to the case before the court.

*Hackett v. Campbell*, 10 N. Y. App. Div. 523, affirmed in 159 N. Y. 537, involved a provision in a contract between the board of education of the City of Yonkers and a contractor, that *no assignment of any portion of the amount due* upon the contract should be made *without the consent* first had in writing, of a committee of the board of education. The contest was between an assignee of moneys due the contractor, to the assignment of which the required consent had not been obtained, and various lien claimants. The court, holding the assignee entitled to priority, says:

"The appeal is based upon the provision of the contract quoted, the appellants' contention being that it forbids any assignment of moneys earned under the contract and effectually prevents the respondent's order from operating as an equitable assignment. To sustain their contention the appellants cite *Burck v. Taylor* (152 U. S. 634). We think the rule there applied has no application to the case before us. In *Fortunato v. Patten* (147 N. Y. 277) the Court of Appeals of this State decided that a similar provision in a contract with the city of New York was inserted solely for the benefit of the city, and that its sole function was to prevent any claim being asserted against the city in the absence of its consent.

The court there distinguished between a provision forbidding the assignment of money due under a contract and one forbidding the assignment of the contract itself. The case of *Burck v. Taylor* (supra) was of the latter character. The case before us was of the first. The provision in the contract with Campbell was that no portion of the amount due on the contract should be assigned without the consent of the committee of the board of education, and the case cannot be distinguished in this respect from that of *Fortunato v. Patten*."

In the case of

*Burnett v. Mayor and Aldermen of Jersey City*, 31 N. J. Eq. 341,

the facts are almost identical with those in the case before the court. The contract there provided that the contractor should not assign, by power of attorney or otherwise, any of the moneys payable thereunder unless by consent of the board of public works, to be signified by endorsement on the contract, and that for a violation of this provision the board would have power to notify the contractor to discontinue all work, and take the work over into their own hands and complete it at the contractor's expense, the cost to be deducted from the moneys due or to become due to him under his contract.

It was contended in this case that an assignment without consent was of no effect as against subsequent creditors giving notice under the lien law. The court held (pp. 352-353):

"The assignment was not void, even as against the city, but voidable *pro tanto* only. The board of works could not deprive the assignees of their right under it. If deemed proper they could protect the interests of the city by taking charge of the work and appropriating the money on hand to its completion. But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and, permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution."

We wish to call special attention to the language used by the court in this case "*The assignment was not void, even as against the city, but voidable pro tanto only.*" For the work performed, the contractor had a right to compensation, and his assignees could not be deprived of their rights thereto. With reference to the portion of the contract yet to be executed by the contractor, the city, if it did not wish to waive the breach of contract, had the right to refuse to proceed with performance on its part upon receiving notice of the breach.

In *Snyder v. City of New York*, 74 N. Y. App. Div. 421, the contract provided that the contractor should not assign "any of the moneys payable under this contract" unless by and with the consent of the commissioner of public works in writing. It was held that the provision was for the benefit of the city. The assignee was permitted to recover from the city.

The case of *Episcopo v. City of New York*, 35 Misc. Rep. N. Y. 623, affirmed in 80 N. Y. App. Div. 627, which was affirmed in 176 N. Y. 572, concerns a contract between Armbrust & Co. and the City of New York for the construction of a sewer. Armbrust & Co. assigned the contract to Reilly. Reilly borrowed \$7,000 from the 12th Ward Bank and gave as security an assignment of "all moneys then due or thereafter to grow due to the extent of \$7,000 upon the reserve of 30% provided for in the contract between the City and Armbrust & Co." The consent of the commissioner was not obtained to this assignment. The contract provided that the contractor will not assign, by power of attorney or otherwise, any of the moneys payable under this agreement, unless by and with the written consent of the commissioner of street improvements to be endorsed on the contract.

The contract also provided that monthly payments of 70% for the work done should be made to the contractor. These payments not having been made when due, the contractor notified the city that he would be unable to proceed with the work if the payments then due were not made on the 25th of the month. The commissioner of the sewers refused to make any further payments and declared the contract abandoned.

At the time of the declaration of the abandonment of the contract, the contractor had earned \$31,824. of which he had received \$15,640.

The contest was between the bank and various lien claimants. The lack of consent to the bank's assignment was urged against its claim. In passing upon this point the court, page 632, states:

"The fact of this omission if properly pleaded would undoubtedly serve as a defense to the city to any claim made against it by an assignee of the contract, but here the claim of the bank is not made against the city, but against the 30% reserve payable under the contract. If these funds do not belong to the city, as has been held, it is a matter of no concern to it what parties are entitled to receive them.

More than this, the city has not put itself in a position to avail itself of this clause in the contract because of its failure to plead it as a defense in its answer. *Burke v. Mayor*, 7 App. Div. 128.

Neither can this clause serve as a defense to the various parties claiming liens, for the reason that its sole purpose is for the protection of the city and not of outside parties. That lienors cannot avail themselves of such a clause was decided in the case of *Fortunato v. Pat-ten*."

Judgment was rendered for the bank.

In the case of *Staples v. City of Somerville*, 176 Mass. 237, the contract was assigned without the consent of the city, thereby violating a provision in the contract requiring written consent. The assignee, plaintiff in the suit, claimed \$4000 which was held up by the city because of conflicting claims, but which the city stood ready to pay to the person entitled thereto. The court held that it *was immaterial that the city did not consent*: that plaintiff



had an equitable right to the money, although the *city could have refused to deal with him.*

In the case of *Board of Trustees v. Whalen*, 17 Mont. 1, the court, speaking of a clause prohibiting the assignment of a contract without the written consent of trustees or architect, says:

“This clause was inserted for the protection of the trustees. They have interposed no objections to these assignments. It does not lie in the mouth of Whalen and Grant to repudiate these assignments after having obtained thereby the Bank’s money to enable them to carry out their contract with the trustees; and as appellants stand in the shoes of Whalen and Grant, it is difficult to see how they can assert rights and defenses against the bank that are not allowable to Whalen and Grant.”

The above suit was brought by the trustees against the contractors, the bank, and various creditors of the contractors to determine their respective rights to a fund. The bank claimed under an assignment made without consent, and some of the defendants had garnished the trustees for debts due from the contractors. On the facts, the case is very similar to the case at bar, and is direct authority on the point that the provision forbidding assignment without consent is for the *benefit of the one whose consent is required, and no other person can interpose the objection.*

*Dillon on Municipal Corporations* (Fifth Edition Vol. 2, page 1282), after referring to like prohibitions in statutes, states:

"Similar conditions govern the effect of a clause in a contract prohibiting the assignment thereof and providing for a forfeiture thereof in the event of its being assigned. Such a clause, forming a part of the contract, has the force of law over those who are parties to the contract. But this provision is inserted in the contract *solely for the benefit of the city* and prevents any claim being asserted against it in the absence of its consent. It is a shield to protect the city and is not intended for the benefit of persons with whom the contractor may deal."

Neither the board of public works nor the City and County of San Francisco, nor any officer, agent nor department thereof, has or asserts any claim to the fourth progressive payment, by either claiming the warrant therefor, or the proceeds of said warrant, declared to have been earned by and payable to the contractor, *before* it was assigned to the Portuguese-American Bank, appellee herein, as part security for \$35,000.00 then loaned by the appellee to the contractor.

(1) Paragraph VII of the amended bill of complaint (p. 12 Tr.) expressly declares:

"\* \* \* that neither said Thomas F. Boyle individually or as Auditor of said City and County of San Francisco, or said City and County of San Francisco, nor any officer, agent or department thereof has or asserts any claim whatever upon said demand or to said sum of six thousand eight hundred thirty and eighty-five one hundredths (\$6,830.85) dollars, or any part thereof, nor any offset nor counterclaim thereto; and that the sole and only reason why said demand, and its proceeds, said six

thousand eight hundred thirty and eighty-five one hundredths (\$6,830.85) dollars, is not immediately delivered by defendant Boyle to said defendant trustee is that there exists some doubt in the mind of defendant Boyle as to whether said trustee or complainant or said defendant bank is the one rightfully entitled thereto."

And paragraph IX of said bill of complaint (p. 15 Tr.) expressly states:

"That no person, firm nor corporation has or asserts any claim, right or offset or counterclaim whatever to said demands or moneys, or any part thereof, save only complainant, said Trustee defendant and Portuguese-American Bank of San Francisco, defendants herein."

(2) The amended return to the order to show cause and answer of Auditor Boyle (p. 67 Tr.) expressly declares:

"\* \* \* and that the City and County of San Francisco makes no claim to said warrant, or demand, or any of the proceeds thereof, nor does this defendant make any such claims, and this defendant is merely a stakeholder."

(3) The answer of appellant John Daniel, trustee (p. 79 Tr.), expressly admits each and every allegation of paragraphs VII and IX of the bill of complaint as amended.

(4) The report of the referee (p. 147 Tr.) contains this finding:

"The Auditor makes no claim on his own account or on account of the city to the demand in controversy, and the city makes no claim thereto."

(5) Mandamus and injunction of the District Court ordered the auditor to allow, approve and deliver to the defendant John Daniel, as trustee, to abide the result of the action, the proceeds to be distributed to whomsoever shall be lawfully entitled (pp. 115-116 Tr.).

This is a complete waiver by the city: the waiver of the breach of any covenant or condition by the contractor is involved by necessary implication in the express declaration by the auditor that neither he nor the city makes any claim to the fourth progress payment.

The facts square with those of *Burnett v. Mayor and Aldermen of Jersey City*, supra:

“But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution” (pp. 352-353).

Provisions prohibiting assignment without consent are frequently found, also, in contracts of lease, insurance and sale; and the courts have held that assignments in violation of such provisions are not void, but that such provisions are solely for the benefit of the parties whose consent is required.

In the case of *Randol v. Tatum*, 98 Cal. 390, a lease contained a covenant to the effect that the lessee would not assign without the written consent

of the lessor: also, a condition that if default were made the lessor might re-enter. Referring to an assignment made without consent, the court says:

“The lessor did not have the option of declaring the assignment void, but it was his privilege, if he desired to avail himself of it, to avoid the lease and end the term; that is if the condition continued after the first assignment” (p. 396).

In the case of *Webster v. Nichols*, 104 Ill. 160, the court holds such an assignment valid, and says:

“The clause in the lease providing that the premises shall not be assigned without the written consent of the lessors, is clearly for the benefit of the lessors only. It does not render the assignment when otherwise made absolutely void, but voidable only at the option of the lessors or their representatives.”

The language here used is criticized in the case of *Randol v. Tatum*, supra, as being too strong. The Supreme Court of California, in this respect, says (p. 398):

“Although in that case the court uses the expression that the landlord has the option to avoid the assignment, the whole quotation shows that the meaning is that the landlord may end the term. The question was whether the assignment was valid. The landlord not only refused to consent to the assignment, but refused to recognize the assignees as her tenants, and received rent from them only as subtenants.”

In the case of *Den v. Post*, 1 Dutch. 289, the landlord took possession on the assignment by the tenant in violation of a covenant not to assign

without consent, on the ground that the assignment was void. It was held that the assignee was entitled to the possession as against the *landlord*, because the lease did not provide for re-entry, and that "neither the lease nor the assignment is avoided by reason of the breach of covenant".

In the case of *Hague v. Ahrens*, 53 Fed. Rep. 58, the United States Circuit Court of Appeals, 3rd Circuit, held, where the lease provided that it could not be sold, assigned or transferred without the written consent of the party of the first part, that the lease would pass by an assignment without the lessor's consent, and that the assignee could maintain ejectment under it against a person placed in possession by the landlord.

*In re Pennewell*, Circuit Court of Appeals, Sixth Circuit, 119 Fed. 139, at page 141, it is stated:

"The authorities, English and American, cited in 18 Am. & Eng. Enc. Law, 369, fully sustain the statement there made that:

"The common-law rule is well settled that a breach by the lessee of his covenants or agreements in the lease does not work a forfeiture of the term in the absence of an express stipulation in the lease or the reservation of a power of re-entry in case of such breach. The general remedy of the lessor in such a case is merely by action for the recovery of damages. This rule applies with regard to implied covenants; express covenants to pay rent; covenants to pay taxes; covenants not to assign or sublet.' "

"Restrictions against assignments or subleases, whether imposed by statute or the terms of the lease, are intended for the benefit of



the lessor and his assigns, and if neither of these object to a breach of the restriction no one else may do so."

*24 Cyc.* 968.

A consideration of these cases, and especially of the California case referred to, shows the rule to be, that a provision in a lease that the lessee shall not assign without the consent of the lessor *does not avoid* an assignment made without such consent. That such an assignment is *valid* and will pass the term; but that if the right of re-entry is reserved for breach of this provision, then the lessor may defeat the interest of the assignee, *not by avoiding the lease or the assignment*, but by exercising his right to *end the term*.

There is certainly no reason why a stricter rule should be applied to contracts, such as the one under consideration. *The question of the assignment of a lease is surely as important to the landowner as that of the assignment of money under a sewer contract is to the city.*

This same construction has been given to provisions in insurance policies requiring the consent of the company to the assignment of the policy, or the property covered by it.

"Even though the policy contains the usual clause providing that it shall be void if assigned without the consent of the insurer, this is for the benefit of the insurer alone, and if he does not object to the assignment other parties will not be permitted to do so."

*13 A. & E. Encycl. of L.*, 2nd Ed. page 186,  
citing *Lienkauf v. Calman*, 110 N. Y. 50.

"This clause (condition against assignment) is for the insurer's benefit, and may of course be waived by it, and where such assignment is made the policy is not avoided, but is merely rendered liable to forfeiture."

13 A. & E. *Encycl. of L.*, 2nd Ed. 194, citing *Illinois F. Ins. v. Stanton*, 57 Ill. 354; *Hyatt v. Wait*, 37 Barb. (N. Y.) 29; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495.

The same construction has been placed upon covenants restricting the assignment of contracts of sale.

In *Wilson v. Reuter*, 29 Ia. 176, the court held that if a mortgage could be regarded as an assignment within the meaning of a contract of purchase, which required the consent of the seller to an assignment thereof, the stipulation was for the *benefit of the seller*, and that he alone could insist upon its enforcement. Defendants did not *succeed to his rights*.

In the case of *Sproull v. Miles*, 82 Ark. 455, which involved the question of assignability of a contract of sale, the court held that where the contract provided that it should not be assigned without the consent of the vendor, and the contract was assigned in violation of the provision, the assignee could *specifically enforce the assignment* against the original vendee.

In *Grigg v. Landis*, 21 N. J. Eq., 494, a contract of sale stipulated that it could not be assigned

without the consent of the vendor prior to the payment of certain installments and making of certain improvements. The contract was assigned in violation of this provision, and the assignee upon performance was allowed to *specifically enforce* the agreement against the *original vendor*.

The Circuit Court of Appeals has intimated that the purpose of this provision of the contract was to protect laborers and materialmen (Opinion, p. 318 Tr.).

We submit that the court cannot read into the contract or the law something which is not there.

*Dillon, Municipal Corporations*, 5th Edition, Section 831, says:

“In the *absence of statutory provision* imposing a duty upon a municipality to protect the claims of sub-contractors, materialmen and laborers, a city usually owes them no duty. *Stipulations of the contract* requiring the contractor to pay for all labor and material are, as a general rule, deemed to be made by the city for its own protection, and not for the benefit of third parties, and do not confer any cause of action against the city in favor of sub-contractors, materialmen, or laborers.”

A fortiori, the clause forbidding assignment of moneys, cannot be construed as a provision for the protection or benefit of third parties.

*Dillon on Municipal Corporations*, 5th Edition, Section 832, states:

“A contract with a municipality to furnish material and perform labor in and about an improvement is, on the question of its assign-

ability, *subject to the same general principles as contracts between individuals.*"

To permit the operation of covenants or conditions restraining the alienation, unless with consent of the city authorities, of moneys earned by the contractor and which have been ordered paid, would be to place in the hands of such authorities power to crush the most responsible and conscientious men on grounds of personal or political ill will.

There are strong reasons in this case supporting just the opposite view from that taken by the Circuit Court of Appeals, on the question of the probable motives of the board of public works in placing this provision in the contract, if, indeed, it is at all proper to *speculate* as to their motives.

In the first place, neither the laws of California, nor the Charter of San Francisco, require or permit the city, or any department thereof, to insert such provisions in contracts for the protection of materialmen, laborers or subcontractors. In the second place, these persons are amply protected by the law.

Under Section 1184 of the Code of Civil Procedure of the State of California (see p. 12 of brief) these persons may give notice to the owner *when they first enter upon the work, at any time during the progress of the work*, and until money falls due to the contractor and he *parts with his right thereto*. Judge Dietrich, in his opinion in this case, speaking of the rights of appellee Welles, says:

"But it appears that under the law he might have fully protected himself against the assign-

ment to the bank and all other contingencies, by giving the notice to withhold when he first entered upon the work."

Furthermore, these persons are amply protected by the bond required of contractors on municipal work under Act 2895 of the General Laws of California. Section 1 of this act is as follows:

"ACT 2895.

An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work.

(Approved March 27, 1897. Stats. 1897, p. 201.)

Every contractor, person, company, or corporation, to whom is awarded a contract for the execution or performance of any building, excavating, or other mechanical work, for this state, or by any county, city and county, city, town, or district therein, shall, before entering upon the performance of such work, file with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom such contract was awarded, a good and sufficient bond, to be approved by such contracting body, officers, or board, in a sum not less than one-half of the total amount payable by the terms of the contract; such bond shall be executed by the contractor, and at least two sureties, in an amount not less than the sum specified in the bond, and must provide that if the contract, person, company, or corporation, fails to pay for any materials or supplies furnished for the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the sureties will pay the same in an amount not exceeding the sum specified in the bond; provided, that such claims shall be filed as hereafter required."

That a bond was given under this act by the Metropolis Construction Company, the contractor in this case, appears from "Exhibit C", attached to the bill of complaint of Paul I. Welles:

"And that said City and County of San Francisco, \* \* \* by and through the Board of Public Works \* \* \* did, to wit: on July 22d, 1910, duly accept the bond of said Metropolis Construction Co., a corporation, as principal, and the Empire State Surety Co., of New York, a corporation, as surety, in the sum of seventeen thousand (\$17,000) dollars, as provided by an 'Act to Secure the Payment of the Claims of Materialmen, Mechanics, or Laborers, Employed by Contractors upon State, Municipal, or other Public Work', approved March 27th, 1897 \* \* \*" (pp. 38-39 Tr.).

*Municipal* corporations do not possess and cannot exercise any powers other than those expressly granted, necessarily implied in or incidental to those expressly granted, or indispensable to the objects and purposes of the corporation.

*Dillon on Municipal Corporations*, 5th Ed.,  
Sec. 237;

*Leslie v. Kite*, 192 Pa. St. 268.

*Municipal* authorities have no power to provide a new remedy by lien or attachment or trust of any kind whereby subcontractors may enforce payment of their claims. The legislature of California has provided a remedy for this purpose, by giving subcontractors on public work, in addition to the bond mentioned, the right to notify the owner to withhold money due or to become due to the



principal contractor at any time from the *commencement* of the subcontract until the principal contractor has earned a payment and parted with his right to receive it. The municipal authorities are without power to enlarge this right by preventing a contractor from assigning moneys after they are earned so as to extend the time within which subcontractors may file their notices to withhold.

*Leslie v. Kite*, 192 Pa. St. 268, 274.

Appellee Welles has no equities as against appellant, and the District Court so found. Mr. Welles entered into an agreement with the contractor to do certain work for *90 per cent of the moneys to be received by the company from the city*. To this subcontract there was no consent of the city as required by the contract (p. 137 Tr.), nor was a copy of the contract for subletting filed with the board of public works as required by the contract (p. 136 Tr.). Mr. Welles negligently omitted to give the notice under Section 1184, when he first entered upon the work or at any time prior to the earning of the payment by the contractor. In a word, Mr. Welles took no steps to protect himself. When the bank made its loan the security offered had been earned, notice of the assignment was in the hands of the auditor, and the records disclosed no claims standing against the funds.

The bank can only look to its assignment for reimbursement. Mr. Welles has a \$17,000 surety company bond for his protection (pp. 32-33 Tr.).

While it is true that but \$6830 is directly involved in this particular case, the balance of the \$38,171 warrants mentioned in the order on the auditor (p. 97 Tr.) *indirectly* depends upon the final judgment herein.

While the record shows that Welles did the work it does not disclose what disposition the Metropolis Construction Company made of the moneys advanced by the bank, any evidence of which would have been inadmissible under the issues, as the bank rested its claim upon an assignment.

Because the record is silent as to this it cannot be inferred that Mr. Welles *did not* receive any of the bank's money.

---

### B.

**MONEYS EARNED BY THE CONTRACTOR IN PERFORMANCE OF ITS CONTRACT, AND ORDERED PAID TO IT BY THE BOARD OF PUBLIC WORKS, CONSTITUTE A DEBT DUE FROM THE CITY TO THE CONTRACTOR WHICH IS RIGHTFULLY THE SUBJECT OF FREE ALIENATION; AND IF THE EFFECT OF THE PROVISION IN THE CONTRACT, THAT THE CONTRACTOR "SHALL NOT, EITHER LEGALLY OR EQUITABLY, ASSIGN ANY OF THE MONEYS PAYABLE UNDER THIS CONTRACT OR HIS CLAIM THERETO UNLESS WITH THE LIKE CONSENT OF THE BOARD OF PUBLIC WORKS," IS TO RESTRICT THE FREEDOM OF ALIENATION OF CHOSE IN ACTION, IT IS TO THAT EXTENT VOID AS CONTRAVENTING PUBLIC POLICY AND THE STATUTES OF THE STATE OF CALIFORNIA.**

The Circuit Court of Appeals has held (p. 316 Tr.), that if the assignment to the appellant by

Metropolis Construction Company, the contractor, was not void for lack of consent thereto by the board of public works, then its equities were superior to those of appellee Welles, for the reason that when the board of public works approved the claims for the work done and directed payment, the right of the contractor to immediate payment became vested in it and was subject to its disposition (following *Newport Wharf & Lumber Co. v. Drew*, 125 Cal. 585).

But the court further held (p. 316 Tr.) that the provision of the contract, that the contractor should not assign moneys payable under it or his claim thereto without the consent of the board, destroyed the right of disposition and made the assignment to appellant void. In so ruling, the Circuit Court of Appeals fell into error. The court should have decided that if this provision attempted to restrict the assignment of the money of the contractor, *earned* by it under the contract and directed to be paid, it was null and void, because intended to prevent the assignment of a chose in action contrary to the policy of the law and the statutes and decisions of the State of California.

In California a chose in action, by virtue of statutory enactments, stands upon the same footing, with respect to transferability, as any other property.

Section 954 of the Civil Code of California provides:

"A thing in action arising out of the violation of a right of property or out of an obligation may be transferred by the owner. \* \* \*"

Section 711 of the same code provides:

"Conditions restraining alienation, when repugnant to the interest created, are void."

The rule is stated in *Meech v. Stoner*, 19 N. Y. 26, at page 29, and approved in *Rued v. Cooper*, 109 Cal., p. 693, as follows:

"Assignability of choses in action is now the rule; non-assignability, the exception; and this exception is confined to wrongs done to the person, the reputation or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage."

The Supreme Court of California has decided that Section 711 of the Civil Code, above set forth, is merely declaratory of the common law.

*Murray v. Green*, 64 Cal. p. 366.

The principle of the common law was this:

Where no reversionary interest in real or personal property was retained by the grantor, any attempted restraint on alienation by the grantee was void. The question involved in an early English case was whether or not the restraint on alienation of certain *bank stock* given to a person and his heirs was void, and in passing on the point Arden, M. R., says:

"I have looked into the cases that have been mentioned, and find it laid down as a rule long ago established, that where there is a gift

with a condition inconsistent with and repugnant to such gift, the condition is wholly void."

*Bradley v. Peixotto*, 3 Ves. Jr. 324.

Lest it might be contended that the covenant or condition of the contract in the case at bar is not such as would be held repugnant to a vested title with right of disposition, we will refer to the case of *Murray v. Green*, 64 Cal. 363, where the condition that the grantee should not alien *without the consent of the grantor*, was held void. The court (p. 367) says:

"It is difficult to conceive of a condition more clearly repugnant to the interest created by a grant of an estate in fee simple than the condition that the grantee shall not alien the same without the consent of the grantor."

Likewise, where property was conveyed to a party who thereafter entered into a contract with her son not to convey the same without the latter's consent, the court held that the agreement was void as a restraint on alienation, and as obnoxious to the policy of the law.

*Prey v. Stanley*, 110 Cal. pp. 426-427.

This same rule is applicable to choses in action.

In the case of *Alkan v. The N. H. Ins. Co.*, 53 Wis. 136, an insurance policy declared that it should be *void* if assigned "either before or after loss". The court, pages 145, 146, says:

"The assignment of the policy in form was in substance and effect an assignment of the debt which the insurer owed the insured. One

of the incidents of ownership of a chose in action of this kind, arising *ex contractu*, is an absolute right to assign or transfer it. It is an elementary rule of law, that a condition or exception in a gift or grant, inconsistent with or repugnant to the nature of the estate given or granted, is void and must be rejected \* \* \*

In *Bradley v. Peixotto*, 3 Ves. Jr. 324, the master of the rolls applied the above rule to a gift of bank stock, with condition that it should be forfeited if the donee should dispose of it, and held the condition inconsistent with the gift, and therefore void. No good reason is perceived why the rule is not, on principle, equally applicable to covenants and contracts. If it is, then it seems very clear that a condition in a policy of insurance that an assignment after loss, \* \* \* shall forfeit the contract and invalidate the policy is in like manner void. For certainly such a condition is entirely inconsistent with the contract of indemnity, after the liability of the insured has become absolute, and only the ordinary relation of debtor and creditor exists between the insurer and assured."

In the case of *Spare v. Home Mutual Ins. Co.*, 17 Fed. Rep. 568 (U. S. Cir. Ct. Oregon), the rule is stated as follows:

"But the stipulation that the policy shall be void if so assigned (without consent) after the fire, stands on a different footing. When the proof of loss was made, and the liability of the defendant under the policy fixed, the relation between the parties was changed from insurer and insured to that of debtor and creditor, and the *delectus personae* of the contract was no longer material. Therefore, this second stipulation is null and void because it



is intended to prevent the assignment of a chose in action contrary to the policy of the law."

The policy in that case provided "if the policy is assigned before or after a fire the same shall be void".

It is to be noted that these provisions are much stronger than that in the case at bar. Here we have no condition or covenant declaring that an assignment without consent *shall be void*.

In the case of *Courtney v. The N. Y. City Ins. Co.*, 28 Barb. (N. Y.) 116, in declaring void a like condition, the court says, page 118:

"If the purpose of the 4th condition, or one of its purposes is to prevent a sale and assignment of the debt after it had accrued and the right to it become perfect, I very much doubt whether such a condition is valid or can be enforced, for the reason that it is repugnant to the principal object of the contract. Whenever the right of property in the debt or damages attaches and becomes perfect, all the incidents of property attach also, including the power of sale and disposition. Now this power of sale and disposition is inseparable from the absolute right of property, and any condition of the kind attached to the sale of real or personal property, when there is no reverter or reversionary estate in the vendor, is repugnant and absolutely void."

Likewise, the case of *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252, the court declared that a provision forfeiting the policy for an assignment *without the company's consent*, was void, so far

as it applied to a claim against the company. The court says:

“The provision of the policy forfeiting it for an assignment without the company’s consent is invalid, so far as it applies to the transfer of an accrued cause of action. It is the absolute right of every person—secured in this State by statute—to assign such claims and such a right cannot be thus prevented. It cannot concern the debtor, and it is against public policy.”

In the case of *Maryland Casualty Co. v. Omaha Electric Light & Power Co.*, 157 Fed. Rep. 514 (Circuit Court of Appeals, Eighth Circuit), the court held that provisions in an employer’s insurance policy prohibiting assignment without the company’s consent, and restricting the right of action for a loss to the assured, did not apply after the company’s liability had become fixed. The court declares that it is settled by the great weight of authority that such liability, “like any other chose in action was assignable regardless of the conditions of the contract in question.” The court cites the case last above mentioned, with others, to support its decision.

In the case of *Goit v. National Protection Ins. Co.*, 25 Barb. (N. Y.) 189, the provision against assignment was in these words:

“that in case of assignment without consent of the company first obtained, in writing, whether of the whole policy or of any interest in it, or of any claim against said company by virtue thereof, either prior or subsequent to loss or damage of the property or premises

insured thereby, the liability of the company in virtue of such policy should thenceforth cease."

In its opinion, the court says (p. 195):

"I am of the opinion that the contract of insurance proper terminated with the loss, and an absolute debt then upon furnishing the proofs by the insured, accrued against the company and that the provisions relied upon ought not to be allowed to defeat this absolute claim."

In the case of *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289 (80 Am. Dec. 573), the policy provided that *neither it nor any claim* under it could be assigned *before or after loss* without the consent of the company. That an assignment without consent would render policy void and that liability of corporation upon such claim would cease. The court held (p. 300) that the condition was *null and void* because opposed to the law of the land.

In the case of *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 598, it was held that a stipulation against assignment after loss without consent would be void as against public policy.

The case of *Carroll v. Charter Oak Ins. Co.*, 38 Barb. 402, affirmed in 1 Abb. App. Dec. 316, cites *Courtney v. The N. Y. City Ins. Co.*, *supra*, and *Goit v. National Protection Ins. Co.*, *supra*, with approval.

It is stated (p. 409) in the decision:

"Even if the policy had contained a provision prohibiting a transfer of the interest

of the insured *after* loss, it seems that according to the weight of authority, the provision would have been illegal and void."

See also *Wood on Fire Insurance*, 2nd Edition, page 758, to same effect.

The rule cannot be more aptly expressed than in the language of *13 A. & E. Enc. Law*, 2nd Edition 201:

"Such an assignment \* \* \* is valid even though the policy stipulates that it shall be void if assigned without consent before or after loss, for such a prohibition is against public policy and is invalid because it is intended to prevent the assignment of choses in action."

We can conceive of no reason why this rule of law should not be held generally applicable to all contracts.

In *Snyder v. City of New York*, 74 N. Y. App. Div. 421, the court held the principle of the insurance cases applicable to public contracts.

In that case a contract for public improvements provided that the contractor should not assign "any of the moneys payable under this contract" unless by and with consent of the commission of public works in writing. After the contractor became entitled to a progress payment the city cancelled the contract.

A claim for moneys *earned* under the contract was assigned by the contractor to plaintiff without such consent. The first point made by the city was that no cause of action vested in plaintiff as

against defendant city, as there could be no assignment without consent.

The court held that the contractor was entitled to receive moneys earned and that

“An assignment of these claims would not be an assignment of the contract, but of a cause of action against the city for the recovery of moneys which it was obligated to pay and in this view of the question there would be no violation of the clause of the contract which prohibited its assignment without the consent of the commissioner of public works. The clause in question is a restriction solely upon the assignment of the contract as such and not of moneys earned thereunder and which the city is bound to pay” (p. 426).

But despite the provisions in the contract prohibiting the assignment thereof or of moneys payable under it, without the commissioner's consent, plaintiff was allowed to recover against the *city*.

The court said:

“It also appeared that the assignment was not made until the work had been completed by another, so that at the time when the assignment was made there was no contract in existence to assign, consequently the city could not be deprived of the services of the particular contractor. There was nothing, therefore, in existence to assign except the claim against the City. Defendant could resist payment only by showing either actual fraud, collusion or mistake.”

The case of *Mellen v. Hampshire Ins. Co.*, 17 N. Y. 609, cited by the court in the above case,

fully supports this view. A policy of insurance prohibited a transfer thereof without the consent of the insurer. After loss suffered the insured assigned the policy. The court held that the restriction was upon assignment during the pendency of the risk, and not upon the transfer of the debt arising from a loss.

This is exactly the situation in the case at bar. Upon the estimate of the engineer and approval by the board of public works, a certain amount of money became due from the city to the contractor, as was found by the Circuit Court of Appeals. The demand in question was not payable *under the contract*, when the assignment was made to the appellant, but was payable under the obligation fixed by the city officials. The city had its work done by its contractor: it enjoyed the fruits of his financial interest in the work. The contract was, in respect to monthly estimates, severable, and the portion represented in the fourth progressive payment was completed and accepted by the board of public works. Nothing remained but for the city to pay the contractor. It is well settled that *assumpsit* would lie to enforce payment of the city's indebtedness.

“While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but the payment



of the price, he may sue on the contract, or in *indebitatus assumpsit*, and rely upon the common counts. In either case the contract will determine the rights of the parties."

*Dermott v. Jones*, 2 Wall. (U. S.) 1;

2 *Encyc. Pl. & Pr.*, page 1009, and cases cited.

In the case of *Episcopo v. City of New York*, 35 Misc. Rep. N. Y., affirmed in 176 N. Y. 572, hereinbefore cited, the court held that an assignment of moneys earned by the contractor in violation of a provision against assignment of moneys payable under the contract, was a matter of no concern to the city. In that case the assignment to the bank was of a portion of the reserve of 30% of moneys earned by the contractor provided for in the contract.

In speaking of this claim the court, page 632, states that

"the claim of the bank is not made against the city, but against the 30% reserve payable under the contract. If these funds do not belong to the city, as has been held, it is a matter of no concern to it what parties are entitled to receive them."

We, therefore, contend that the provision of the contract restricting the assignment of moneys payable under the contract, or the contractor's claim thereto, cannot be reasonably construed to apply to money which has been ordered paid to the contractor *prior to its assignment*. While it may be said that the money arose out of the performance

of the contract, still it is *not payable under the contract*, but is payable under the order of the board of works. The transaction in question was in effect an accounting between the city and its contractor as the work progressed. The claim is no longer on the contract, but is on the account stated between them, and cannot be resisted except for fraud, collusion or mistake.

While it is no more necessary in this case than it was in *Snyder v. City of New York* to hold that the provision of the contract requiring consent applies to *money already earned* by the contractor, still, if it were necessary to so hold, then under the authorities such provision, as far as it attempts to restrain the assignment of *debts* due from the city to the contractor, would be void as against public policy.

There is no authority to be found which sustains the right of the board of public works to restrain by covenant or condition, the alienation of moneys by the contractor *after* the right to them had "vested": *after* the board had decided that the *conditions of the contract had been fulfilled*, and *after* the board had approved the claims for the work done and had directed payment of the same.

## C.

IT APPEARS FROM THE CONTRACT IN THIS CASE THAT IT WAS NOT THE INTENTION OF THE PARTIES THAT AN ASSIGNMENT OF MONEYS EARNED BY THE CONTRACTOR AND ORDERED PAID TO IT BY THE BOARD OF PUBLIC WORKS SHOULD BE VOID IF MADE IN VIOLATION OF THE PROVISION THAT "HE SHALL NOT, EITHER LEGALLY OR EQUITABLY, ASSIGN ANY OF THE MONEYS PAYABLE UNDER THIS CONTRACT OR HIS CLAIM THERETO UNLESS WITH THE LIKE CONSENT OF THE BOARD OF PUBLIC WORKS".

Taking up this point, we desire to call attention to the fact that the Circuit Court of Appeals held (pp. 315-316 Tr.) that the fourth progress payment *became due* to the contractor from the City of San Francisco *when* the board of public works *approved the estimate of the city engineer and directed its payment*. When the board of public works authorized the payment of \$6830.85 by the city to the contractor the obligation of the city which had been created in favor of the contractor by the board of public works became complete, and the right of the contractor to immediate payment became vested in it and was subject to its disposition (pp. 315-316 Tr.), following *Newport Wharf & Lumber Co. v. Drew*, 125 Cal. 585. Thereupon the contractor presented its demand for this fourth progress payment, had the same approved by the board of public works, and assigned it, with two others, to appellant for a present consideration of \$35,000.00 (pp. 141-142 Tr.). Appellant parted with its money on the faith

of the assignment, and any covenant or condition in the contract between Metropolis Construction Company and the board of public works bearing on the contractor's right to alienate its own property should be given a construction favorable to alienation, and not a construction which would defeat the rights of appellant.

There is no provision in the contract that an assignment without consent shall be *void*, or that it will *ipso facto* terminate any rights under the contract, nor is there any provision in it showing what will be the effect of a breach of a provision, condition or covenant except the following taken from the same "General Provisions" of the specifications annexed to the contract, that contains the provision that the contractor shall not assign any moneys without consent (p. 306 Tr.):

"TERMINATION OF CONTRACT: All conditions of this contract are considered material and failure to comply with any of said conditions on the part of the contractor shall be deemed a breach of the contract.

Should the contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated.

The passage of a resolution by the Board of Public Works stating that the contract is terminated and the service of a copy of said resolution upon the contractor shall be deemed a complete termination of the contract."

Appellant contends that this provision and that relating to assignment of moneys must be read

together to determine the intention of the parties to the contract. From them it is evident that the neglect of the contractor to obtain consent was merely the breach of a covenant for which the board of public works *might* by resolution terminate the contract, or it was the breach of contract for which an action for damages will lie. In either case the assignment will be *good and enforceable* and *vest title* in the assignee.

The provision that the contractor "shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works," is followed in the same portion of the contract by the provisions entitled "Termination of Contract".

It is apparent, therefore, that the contract was drawn up with due consideration of the penalties which breaches would entail. For failure of the contractor to comply with any of its conditions, "the Board of Public Works shall have the *right*, whether any alternative right is provided or not, to declare the contract terminated". No alternative rights are provided. Any other rights which the board of public works may have are general contract rights. The provision relating to termination of contract consists of two parts: one declaring that a "*failure to comply*" with any of its conditions "shall be deemed a *breach* of the contract"; and the other, that if the contractor should "*neglect or fail to perform* any of the conditions of the

contract" the board may "declare the contract terminated".

It is clear that the board of public works had in mind the possible violation of the agreement and undertook to provide against such a contingency.

Yet there is no provision of the contract which is directly operative upon dealings between the contractor and third parties, in violation of its terms. It is not declared that such dealings shall be void, or of no effect, or that no rights shall be acquired thereby. The only declaration is that a *failure to comply* with the conditions shall be deemed a *breach of contract*, or at most may give the board of public works the privilege of declaring the *contract terminated*. In the latter case, if the assignee's rights depended upon the performance of the contract, a termination of the contract *would not* make the assignment *void*, but would end the rights of the contractor. The remedy is solely against the *contractor*.

A like provision was considered by the Circuit Court of Appeals for the third circuit in the case of *Hague v. Ahrens*, 53 Fed. 58, and that court reached a different conclusion from that in the case at bar. That case concerned a lease which contained a clause: "This lease not to be sold, assigned or transferred without the written consent of the party of the first party."

The lease was assigned without consent of the lessor. The assignees after a short occupation of the land apparently abandoned it. Some months



after this the landlord made another lease to Hague, who entered into possession and rendered the land profitable.

Thereafter, the assignee assigned the lease to Ahrens, who brought an action in ejectment against Hague to recover possession of the premises, and was awarded judgment, which was affirmed.

Defendant contended that the lease was not assignable without consent and that the clause in the lease was a "limitation".

In discussing this the court states:

"The court treated the clause of the lease (recited in the first assignment) as a covenant, simply. The plaintiff urged and still urges that it is a 'limitation.' By this term he must be understood to mean a condition subsequent, or a conditional limitation; as applied it can have no other signification. Was the court right? A condition subsequent is a contingency named, on the happening of which a grant may be defeated,—such as the failure to pay money, erect buildings, or do any other required act, the failure to do which authorizes the grantor's re-entry. A conditional limitation—an example of which is a grant to one so long as he occupies the premises, or to a widow during widowhood—differs from it only in form, and the fact that re-entry is not necessary to terminate the grant. The law regards conditions with the same disfavor it does forfeitures; and for similar reasons. A clause will not therefore be treated as a condition if it can be construed a covenant without violence to its terms. If the purpose to create a condition, or conditional limitation, is not expressed in clear, unequivocal language—as the courts have frequently said in 'apt terms', such as 'upon condition', 'pro-

vided nevertheless', 'so long as,' 'during,' etc.—the clause will be treated as a covenant, simply. The provision under consideration does not contain such language. The terms, 'this lease shall not be sold, assigned, or transferred, without the written consent of the party of the first part,' convey no suggestion even that the lease may be lost by such transfer. They express simply an agreement by the lessee, who alone could make the transfer, that he will not do it. If the lessor was not satisfied with the remedy which the law affords for breaches of such agreements he should have stipulated for another by adding terms of condition or forfeiture. That he knew very well how to do this, and had it in mind, as respects breaches of other provisions of the lease, is shown by the following clause: 'A failure to pay the money after demand made, or put down the well, as hereinafter stipulated, shall forfeit this lease within one year from the date hereof.' The inference is strong, therefore, that he did not contemplate similar consequences as the result of a transfer."

*Grigg v. Landis*, 21 N. J. Eq. 494, was a suit for specific performance by an assignee of a vendee whose assignment had not the consent of the vendor, as required by the contract of sale. In passing upon the effect of a breach of the provision requiring the vendor's consent to the assignment of the contract, the court says:

"But there is no clause of forfeiture or re-entry for condition broken in the agreement. Certainly this court will not interpolate a forfeiture. Where there is no clause of avoidance or of re-entry, a breach of the covenant will not work a forfeiture or determination of an interest in lands. \* \* \* The usual and proper

remedy for such a breach is an action for damages. \* \* \* But the restriction upon alienation, whether it be called a condition or a covenant, did not exist after the installments of purchase money had been paid and the improvements essentially made, and there is no difficulty in giving the assignment effect between all the parties at that time and affording relief to appellant."

Hence, when an existing interest is assigned in violation of an agreement not to assign without consent, the assignment is nevertheless good and enforceable against the party whose consent is required. If the contract reserves no other remedy the only remedy lies in damages.

Appellant further contends, in this behalf, that it appears from the contract that it was not the intention of the parties to require the consent of the board of public works to an assignment of moneys to any person, other than a subcontractor, and merely for the purpose of security. The provision relating to consent is but a portion of the following single paragraph:

"No subcontract shall relieve the contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the board of public works."

The words "like consent" refer to the consent of the board of public works to assigning or subletting the work under the contract, provided

for in a previous portion of the same subdivision, found on page 296 of the transcript.

This provision is incorporated in the "General Provisions" of the "Specifications" annexed to the contract, and terminates that portion thereof termed "*Sub-contracts*" (pp. 296-297 Tr.). The subject matter of this "Sub-contract" portion of the "General Provisions" is assignment and subletting of the work. The provision requiring the consent of the board of public works to the assignment of moneys occurs in the last sentence of the last paragraph, the introductory sentence of which still deals with the subject of *subcontracts*. As the whole subdivision is devoted to the requirements for and manner of assigning or subletting work under the contract, obviously the covenant or condition under consideration must be construed to have some connection with the general subject "*Sub-contracts*", unless the context forbids such construction. The Circuit Court of Appeals has taken the stipulation against assignment without consent as if it appeared in the body of the contract, and held that it "plainly stipulates against the assignment of the payments". We respectfully contend that when the provision is read as a portion of the specifications, and in connection with what precedes it, it does not stipulate against assignments of moneys which belong to the contractor. The stipulation is introduced by the words: "No subcontract shall relieve the contractor of his liabilities or obligations under

this contract." Then, immediately following and as a part of the same paragraph, "He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the board of public works." It will be noted that the term "moneys payable" is very vague and general: not moneys payable to the contractor, nor moneys earned by the contractor, but moneys to be earned while the contract remains executory. We contend that this provision governs only the dealings between the contractor and subcontractor. It stipulates that if the contractor assigns or sublets the work, the city may still look to him as a surety for its proper performance; and that he shall not assign to any subcontractor the money *to be earned* by performance of the work under the contract, unless with the consent of the board of public works, obtained in the same manner required for assigning or subletting the work. If this consent is not obtained, the contractor will be the only one recognized by the board in authorizing payments under the contract. The whole scheme of this portion of the contract is to compel the contractor to exercise his personal control, unless he assigns to a person who is acceptable to the board of public works, both as to his ability and reliability. In short, this provision relates to moneys, and the contractor's claim to moneys, payable under the contract *while it is executory*, and has no reference whatever to

moneys which have been earned by the contractor through performance of a specific portion of the work, and which the board of public works have by resolution converted into a debt due to the contractor from the city.

This interpretation is also demanded by the fact that the provisions relating to *payments* are found in another part of the specifications annexed to the contract (pp. 135-136 Tr.). No covenant or condition is found here requiring the board's consent to assignment of *payments*. No reference whatever is here made to the provision under "Sub-contracts". On the contrary there exists only the absolute, unqualified covenant that upon the "estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law an amount equal to 75 per cent of said city engineer's estimate".

This interpretation is further demanded by the reason or purpose set forth in the contract for requiring the consent of the board of public works. For the assignment or subletting of work, consent of the board of public works is required, and for the assignment of moneys payable under the contract "*like consent*" is required. By reference to page 296 of the transcript, it appears that the purpose for requiring the consent of the board is to enable the board to know the identity of the assignee, and to determine his responsibility and standing. Certainly, none of these reasons for



requiring the board's consent can apply to the assignment of earnings which are no longer payable under the contract, but which are payable under the authorization of the board itself, and constitute a chose in action in the hands of the contractor. When the board has determined that a certain amount of money is due to the contractor, and has ordered it paid, the character of the assignee who then takes title can be of no concern to either the board of public works or the city.

Before closing our argument, on this point we will make one more observation. The consent required is that of the *board of public works*. Under the Charter of San Francisco, the board of public works, upon their approval of the demand, had taken final action, as far as it was concerned. Now the question presents itself: If it was the intent to prohibit the assignment of the moneys earned by the contractor, *after the work was done*, and *after the moneys were ordered paid*, why should the consent of the board of public works be required?

That body could not possibly be interested in the disposition of such money by the contractor because of any of the reasons set forth in the contract for requiring consent to its assignment.

It appears, therefore, that while the board of public works had in mind, in drawing up its contract, the fixing of remedies for breaches of its provisions, it declared that the failure to comply

with, or the neglect to perform them should be deemed a *breach of contract*, or at most give the board the right to declare the *contract* terminated. Not one word in reference to the *assignment* in such cases is to be found in the whole instrument. It does not provide that it shall be *void*, or that it shall be *unenforceable*, or that the assignee *shall acquire no rights under it*.

And it further appears that this provision requiring consent refers, on a reasonable interpretation of the contract, to the *benefits* to accrue therefrom by the performance of the *burdens* imposed thereby.

---

#### Point Two—Assignment.

If the decree of the Circuit Court of Appeals herein is erroneous for the reason stated, it cannot be supported on the ground that the assignment is invalid in any other respect.

Lest it should be urged that the assignment is void for *some other reason*, we will anticipate the contingency by briefly stating the appellant's position in the following pages.

The facts establish four points:

First: *The bank had no intention of making the loan without security.* When the managing officers of the company called on the bank for the loan the president of the bank asked the general manager of the company what *collateral security* he had to offer

therefor (p. 139 Tr.). Furthermore, the bank officials required the order on the auditor to be *presented and accepted* at the auditor's office, before accepting it as collateral (pp. 140, 141 Tr.).

Second: *The company did not intend or expect that the bank would advance \$35,000 without collateral security.* When the general manager of the company visited the bank for the purpose of getting this loan *he had with him* an order on the auditor authorizing and empowering the bank to draw the warrants (p. 139 Tr.), and also certified copies of three resolutions of the board of public works allowing the progress payments under the contracts (p. 140 Tr.). When the general manager of the company finally turned these documents over to the bank, "he intended that said order should be a complete assignment of the full amount of the three warrants set forth therein" (p. 141 Tr.).

Third: *The security was*, at the time it was given and accepted, *a debt due from the city to the contractor* (as decided by the Circuit Court of Appeals p. 316 Tr.), and the *lawful subject of assignment.*

Fourth: *The collateral security was given and accepted for a present valuable consideration* (pp. 141, 142 Tr.).

We believe that under the laws of California the assignment was a legal assignment; but, whether viewed as a legal or as an equitable assignment, all the elements of a valid assignment are present. The case of *Fourth Street National Bank v. Yardley*, 165

U. S. 634, involved facts which were very similar to the facts of this case, and the Supreme Court of the United States after reviewing the circumstances under which a *check* had been given for a loan, concludes as follows:

"It could not be reasonably conceived that the loan would be made without reference to the assignment of the fund from which alone the hope of immediate payment was to be reasonably expected \* \* \* The transaction, therefore, was a proposition to borrow on the one hand, accompanied by the disclosure that security was necessary, and tendering the security, and on the other hand, an acceptance of such proposal and an advance made on the face of it."

The facts in that case were not as strong as in the case at bar, for all the bank held in that case was a *check* which is ordinarily held not an assignment *pro tanto*, while in this case the *order* was for the *whole fund*. Yet the court carefully examined the *circumstances* under which the check was given and received, and concluded that in the light of those circumstances an assignment was *intended*.

Mr. Justice Story, in the case of *Mitchell v. Winslow*, 17 Fed. Cases p. 533, states the rule as follows:

"It seems to me a clear result of all the authorities, that whenever the parties, by their contract, intended to create a positive lien or charge upon real or personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons

asserting a claim thereto, under him, either voluntarily or with notice, or in bankruptcy."

In his work on *Equity Jurisprudence*, 13th Ed., Vol. 2, page 366, discussing equitable assignments, Judge Story says:

"Indeed any order, writing or act which makes an appropriation of a fund amounts to an equitable assignment of that fund. The reason is that the fund being matter not assignable at law nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in equity. \* \* \* An assignment of a debt may be by parol as well as by deed."

The rule is also stated in 4 *Cyc.*, page 37, as follows:

"No particular mode or form is necessary to effect a valid assignment. The assignment *need not be in writing*, and if in writing it may be in the form of an agreement or *order*, or in the form of any *other instrument* which the *parties themselves* may use for the purpose." (Italics ours.)

"An assignment may be inferred from the conduct of the parties."

4 *Cyc.*, 43.

No notice of an assignment need be given.

*Vol. II, Am. & Eng. Encyc. Law.*, 2nd Ed., p. 1076.

In the case of *McIntyre v. Hauser*, 131 Cal. 11, the court says (p. 14):

"In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the par-

ties was to pass title to the chose in action, then an assignment will be held to have taken place."

But it is not necessary, in this case, to base the appellant's rights on equitable assignment, for under the laws of the State of California the transaction constituted a *legal assignment*.

In the case of *Curtin v. Kowalsky*, 145 Cal. 431, the court (p. 434) says:

"Prior to the adoption of the codes it was held that, inasmuch as a judgment was not assignable at common law, the effect of such assignment was to transfer an equitable title only, but that such title vested in the assignee all the beneficial interest in the judgment, and gave him the right to enforce it by process in the name of the judgment plaintiff. (*Wright v. Levy*, 12 Cal. 262, 263.) It was said to be property, however, which could be purchased, the same as any other species of property. (*Ibid.*) Under the code there is no limitation upon the power to assign choses in action, including judgments, and it is clear from its provisions that such an assignment carries legal title to the judgment and that the transfer of the title does not depend upon the fact of there being a valuable consideration. It is provided that 'Property of any kind may be transferred, except as otherwise provided by this article.' (Civ. Code, sec. 1044), and the only exception made in the article is that of a possibility not coupled with an interest. A judgment is therefore property which can be transferred. A transfer is declared to be 'an act of the parties, or of the law, by which the title to property is conveyed from one living person to another.' (Civ. Code, sec. 1039.) It is further provided that 'A voluntary transfer is an executed contract, subject to all the rules of law concern-



ing contracts in general; except that a consideration is not necessary to its validity' (Civ. Code, sec. 1040), and that 'A transfer vests in the transferee all the actual title to the thing transferred which the transferrer then has' (Civ. Code, sec. 1083), and also all of its incidents. (Civ. Code, sec. 1084.)"

This is true even in cases where the assignment is made for security.

In the case of *Gilman v. Curtis*, 66 Cal. 116, the court says:

"Conceding that it appears with sufficient certainty that the policy in question was assigned by the plaintiff to the defendant, to be held by him as collateral security for certain advances to be, and which were made by him, the legal title to the policy passed by the assignment to the defendant. The court could not, therefore, have adjudged the plaintiff the owner of the policy, and entitled to receive from the insurance company the whole amount due upon it. The interest of the plaintiff in the policy, upon that condition of facts, is in what remains of it after the advances, for the security of which it was assigned, have been satisfied, and defendant cannot be made to surrender it to plaintiff until the advances made by him are repaid."

*Widaman v. Hubbard*, 88 Fed. Rep., p. 812.

There are no limitations, therefore, on the transfer of choses in action under the California Code, and the question as to whether or not an assignment has taken place is to be determined by the laws and

decisions of this State relating to the transfer of title to personal property.

*Butcher v. Cheshire R. R. Co.*, 125 U. S., p. 583.

*Rose, Code Federal Procedure*, Vol. I, Sec. 10, notes (a), (aa), and (b).

Besides the sections of the Civil Code of California set out in the portion of the opinion above quoted from *Curtin v. Kowalsky*, the following may be referred to:

"Section 954: A thing in action arising out of the violation of the right of property or out of an obligation may be transferred by the owner.

Section 1458: A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such.

The only exception mentioned in the article is under section 1045: 'Possibility. A mere possibility not coupled with an interest cannot be transferred.'

Section 1052: When oral. A transfer may be made without writing in every case in which a writing is not expressly required by statute.

The transfer in question does not come within section 1624, 'What contracts must be written.'

Section 1140: Transfer of title under sale. The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

The word "transfer", as used in these sections, includes assignments.

*Curtin v. Kowalsky*, supra;

*Cross v. Savings Bank*, 66 Cal., p. 466.

In the last case the court says:

"The term assignment refers to a class of acts by which the right or title to something of value is transferred to another before the object of the transfer has become property in possession."

Every requirement of the laws of California to constitute a legal assignment has been satisfied in this case.

"The transaction \* \* \* was a proposition to borrow on the one hand accompanied with the disclosure that security was necessary and tendering the security, and on the other hand an acceptance of such proposal and an advance made on the faith of it." (*Bank v. Yardley, supra.*)

If we apply the reasoning of that case to this, there is no escape from the conclusion that the bank is a bona fide assignee of the fund represented by the demand for said fourth progress payment; it cannot "reasonably be conceived" that the bank loaned thirty-five thousand (\$35,000.00) dollars "without reference to, and assignment of," the only fund out of which it could reasonably expect immediate payment.

The order on the auditor is but one item of the whole transaction of December 6, 1910,—a means given by the company to the bank to carry out the mutual understanding. When, from all the circumstances the *intent to transfer title* appears, that intent will prevail. No *writing* is necessary: no *notice* of the assignment is required to be given. These

principles are fully supported by the following authorities:

*Civil Code of California*, Sec. 1052, *supra*;  
*Curtin v. Kowalsky*, 145 Cal. 431;  
*McIntyre v. Hauser*, 131 Cal. 14;  
*Smith v. Peck*, 128 Cal. 530;  
*Lawrence etc. Bank v. Kowalsky*, 105 Cal. 43;  
*Renton etc. Co. v. Monnier*, 77 Cal. 457;  
*Spain v. Hamilton's Adm's*, 1 Wall. 604;  
*4 Cyc.*, 7, 37, 43;  
*9 Cyc.*, 588.

It is quite immaterial whether the assignment is legal or equitable. In any case, the assignee will be protected.

In this case there is no question of acceptance involved, for the assignment is not of a portion of a fund, but of the *entire* progress payment.

With passage of title to this payment the right to have and receive it vested in appellant, and the assignor parted with all right to possession.

*Gilman v. Curtis*, 66 Cal. 116;  
*McIntyre v. Hauser*, 131 Cal. 14.

Appellees may contend that the assignor had not parted with complete control of the fourth progress payment, because the demand was in the name of the Metropolis Construction Company, and that it could not be collected without the company's endorsement.

What might happen afterwards, in the collection of the money is entirely immaterial. The fact that the demand was in the name of the contractor is a matter over which the parties had no control. The demand was not assigned until *after it had been drawn up and approved by the proper officials*. This fact would give the assignor no right to draw it or appropriate any of its proceeds.

In the case of *Scheerer v. Edgar*, 76 Cal. 569, the court says:

"In this case the course of the auditor in making his warrant payable to Friedhofer was proper, notwithstanding the assignment, because the judgment was payable to him, and the order of the board of supervisors directed that the amount should be so paid. Having drawn a proper warrant, the duty of the auditor was ended, and he certainly cannot be compelled to draw a second warrant, still less, to draw one in favor of a party who is not entitled to it under the order of the board. The assignment of the judgment gave to the plaintiff the right to the warrant when it was drawn, and to compel Friedhofer to execute a proper transfer thereof to him, if he refused to do so, but it did not give him the right to compel the auditor to draw a warrant not authorized by law."

This point is treated in a masterly manner by the learned referee, who heard the case under authority to report his conclusions, and his opinion is set forth at pages 157-172 of the transcript.

---

### Point Three—Priority.

Appellees further contended in the court below that appellee Welles was entitled to priority in

virtue of his notices to withhold, under section 1184 of the Code of Civil Procedure of the State of California, *supra*.

Their contention was, that the fourth progress payment was not due, within the meaning of that section, at the time it was assigned to appellant, because the demand or warrant therefor, after its approval by the board of public works, had still to pass through several prescribed stages in the process of payment.

It appears from the bill of complaint of appellee Welles that his claim was allowed and approved by the referee in bankruptcy as a secured claim. The trustee, the other appellee, represents the general creditors under the bankruptcy law. Hence this question of priority is one that affects the rights of Welles and the bank, only.

In the interpretation of this section, the only point of difference between the parties arises over the word "due" in the following portion: "\* \* \* and he (the person who contracted with the contractor) shall withhold from his contractor \* \* \* sufficient *money due*, or that may become due to such contractor", etc. (Italics ours.)

Welles' right to priority depends entirely upon the "notices to withhold" which are provided for by Section 1184 of the Code of Civil Procedure of California, *supra*.



A "notice to withhold" under this section is in the nature of a *garnishment*.

*Newport Co. v. Drew*, 125 Cal. 585, at page 589;

*Bates v. Santa Barbara Co.*, 90 Cal. 543, at page 546;

*Bianchi v. Hughes*, 124 Cal. 24, at page 27;

*Butler v. Ng Chung*, 160 Cal. 435, at page 439;

*Diamond Match Co. v. Silberstein*, 165 Cal. 282, 288.

It is operative only as to moneys then due or that may later become due to the contractor.

As to the moneys theretofore due and assigned by the contractor *prior to the giving of such a notice*, it is inoperative for the simple reason that such moneys are no longer *due* to the contractor but to the *assignee*.

*First Nat. Bk. v. Perris I. Dist.*, 107 Cal. 55, page 62;

*The Newport Wharf and Lumber Co. v. Drew*, 125 Cal. 585, page 589;

*Long Beach School Dist. v. Lutge*, 129 Cal. 409, 413.

*27 Cyc.*, 231, 232;

*Spengler v. Stiles-Tull Lumber Co.*, (Miss.) 48 So. 966, at page 973.

It is true that a contractor cannot prevent the effect of a "withholding notice" by assigning his rights to payments *before they are due*.

If the fourth progress payment was due to the company on or before December 6, 1910, there can be no question but that it could assign it and its assignee would take title superior to any claims subsequently made by subcontractors by virtue of withholding notices under said section 1184 of the Code of Civil Procedure of California.

When money becomes due under a contract of this kind, is a matter to be determined by the terms of the contract and the provisions of the Charter of the City and County of San Francisco. The following sections are to be found in Chapter I of Article VI of the said Charter:

“Sec. 22. The work in this Article provided for must be done under the direction and to the satisfaction of the board of public works; and the materials used must be in accordance with the specifications and be to the satisfaction of said board, and all contracts provided for in this Article must contain a provision to that effect, \* \* \*”

“Sec. 11. Said board (of public works) shall appoint a civil engineer \* \* \* who shall be designated the city engineer. \* \* \* He shall perform all civil engineering and surveying in the prosecution of the public works and improvements done under the direction and supervision of said board, and shall certify to the progress and completion of the same, \* \* \*”

(Only the portions deemed material are printed.)

To determine when the money became *due* from the city to the contractor, we must bear in mind that the indebtedness of the city is a different

matter from the demands afterwards made out therefor; and that the Charter provisions governing *approval* and auditing of *demands* are not to be given any weight as determining when the money became *due*. They constitute the *manner of payment* merely.

This may be illustrated by reference to the following Charter provisions:

(Art. IV, Chap. II, Sec. 7.)

"Every demand \* \* \* must \* \* \* be presented to the auditor, who shall satisfy himself whether the money is *legally due*, etc." (Italics ours.)

Also (Art. III, Chap. III, Sec. 13):

"Every *demand* \* \* \* shall \* \* \* show: \* \* \* 3. The fiscal year within which the *indebtedness was incurred*." (Italics ours.)

It seems clear that no *indebtedness* could be incurred unless money was *due*, and that the indebtedness must *precede* and *give rise* to the *demand*.

The contract under consideration is between the company and the board of public works and the contract and the Charter, both require that the work "shall be done under the *direction* and to the *satisfaction* of the board of public works." (p. 157 Tr.)

The contract provides, also, "progressive payments for said work to be made, as provided for in the specifications therefor." (p. 135 Tr.)

The specifications provide:

"In order to assist the contractor to prosecute the work advantageously, the city engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated in the herein proposed work by the contractor.

\* \* \* \* \*

*Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said city engineer's estimate"* (pp. 135, 136 Tr.) (Italics ours.)

Hence, the fourth progress payments became due to the contractor upon the *estimates* being made by the engineer and the board of works signifying their *satisfaction with the work*.

Where a public building contract provides that the work shall be done under the direction and to the satisfaction of a designated official and the work is done to his satisfaction, payment therefor cannot be refused, unless it appears that there was some fraud or mistake on his part.

*Moore v. Kerr*, 65 Cal. 519, at page 521.

Cited with approval in

*American-Hawaiian Eng. Co. v. Butler*, 165 Cal. 457, at page 513;

*California Sugar Agency v. Penoyer*, 167 Cal. 274, at page 279.

In the latter case, at page 279, the court states:

"Nothing is better settled than the rule that where the parties agree that the performance

or non-performance of the terms of a contract, or the quantity, price or quality of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding, in the absence of fraud or mistake."

The fourth progress payment estimate was made by the city engineer on December 3, 1910. This estimate was approved by the board of public works on December 5, 1910. On the same day, the board of public works by resolution, authorized a fourth progressive payment to said company, and a "Demand on the Treasury" in favor of the company for said payment was approved by the board of public works. (p. 138 Tr.)

In the case of *The Newport Co. v. Drew*, 125 Cal., p. 589, the court says:

"The contractor cannot prevent the effect of this notice as to any payments that may mature after it is given, but its effect on payments that have *matured, before it is given, but which have not been made*, is to be determined by the rights of the contractor in reference to them. If he is still entitled to demand their payment from the owner, such payment is intercepted by the notice, *but if he has already assigned them to a third party the notice will be inoperative to prevent their payment to such party.* (Code Civ. Proc., Sec. 1184; *Bates v. Santa Barbara County*, 90 Cal. 543; *First National Bank v. Perris Irr. District*, 107 Cal. 55." (Italics ours.)

On pages 589 and 590 the court says:

"The provision in the contract for the payment of ninety per cent of the value of the materials used and labor performed 'as the work

progresses', with the condition that, before any payment should be made, the superintendent of construction should, not oftener than once a month, furnish an estimate of such labor and materials, with the amount due thereon, rendered such installment of the contract price due and payable immediately upon the *acceptance of the work* by the trustees. The contract provided that the work should be done to the *satisfaction* of the board of trustees, and the contractors were not entitled to demand payment of the amount of the estimate until after such approval and acceptance. Their approval of the estimate and direction for its payment implied their satisfaction with the work without any formal declaration to that effect. Upon such approval and direction the *obligation* of the state which had been created in favor of the contractors by the trustees *became complete*, and the right of the contractors to *immediate payment became vested* in them and was subject to their *disposition*." (Italics ours.)

On page 592, is the following:

"Upon their (trustees) acceptance of the work the contractor became immediately entitled to the payment of the amount of the estimate."

Hence, the *estimate* and *satisfaction with the work* were the elements which fixed the *obligation* to pay.

Hence, upon the completion, *estimate*, and *acceptance* of the work, or any *progressive part thereof*, the *contract price*, or *proper portion thereof*, becomes immediately *due* and payable; thereafter, the *approval* of the *demand* for such price, or part thereof, is a plain *ministerial duty*.



The demand is nothing more than a bill presented to the city for the amount of the debt incurred.

The distinction between the debt and the demand is further illustrated by the Newport case in this: The court decided that upon the *estimate* of the superintendent and *acceptance* of the work by the trustees, the right to *immediate payment* vested in the contractors; but immediate payment could not be obtained. Reference to the Political Code of California then in force will show that the controller *could not draw his warrant, until* the state board of examiners had *approved* the demand.

"Sec. 672. CONTROLLER NOT TO DRAW WARRANT FOR CLAIMS NOT AUDITED BY EXAMINERS. The controller must not draw his warrant for any claim unless it has been approved by the board \* \* \*"

Sec. 433. It is the duty of the controller:  
 \* \* \* 10. To audit all claims against the state in cases where there are sufficient provisions of law for the payment thereof. \* \* \*  
 17. To draw warrants on the treasury for the payment of moneys directed by law to be paid out of the treasury; \* \* \*"

All this required time and precluded any idea of *actual, immediate payment*, in point of fact. These steps may be regarded, however, as successive acts in the process of payment. The following language is pertinent here:

"The provision in the contract for the payment of the *contract price* in *controller's warrants* on the state treasurer *did not affect* this power of disposition, or *right to immediate payment*, or suspend its exercise until such war-

rants should be obtained. The failure or neglect to obtain a warrant *immediately* upon the *approval* of the estimates would have no greater effect than a similar failure on the part of the contractor, in case of an ordinary building contract, to obtain a *check* from the owner *immediately* upon receiving the architect's certificate that the installment is payable." (Italics ours.)

*The Newport Co. v. Drew*, 125 Cal. 590.

The board of examiners act in the same capacity on claims against the State as do our board of supervisors on claims against the city, and the controller acts in the same capacity as our auditor. Yet, in the Newport case the court decided that the approval of the board of examiners was not required to make the demand due.

The *measure* and *approval* of the work *create* the indebtedness and *fix* the obligation of the city to pay; the approval of the demand authorizes the treasurer to disburse the money.

Under the law, therefore, there was no *part* of the fund upon which the notice of Welles could operate. In the case of *First National Bank v. Perris Irrigation District*, 107 Cal. 62, the court says:

"If the contractor, previous to the giving of the notice (under said Sec. 1184) has transferred to another, who takes the assignment for value and without notice of the latent equities of the materialmen, the amount then actually due and payable on the contract, there is nothing either due or to become due to him, and there is no fund on which the notice can operate."

In this case the board of public works occupies the same position as the trustees, and the city engineer the same position as the superintendent of construction, in the Newport case. It is to be noted that the trustees in the Newport case had the right to *approve payments* under that contract and they were also the parties to be *satisfied* with the work. In them, under the law and the contract, were centered the two functions of *accepting the work* and *approving the payments therefor*.

To understand the decision in the Newport case, it is essential to keep in mind the *dual* capacity in which the trustees acted. The distinction between the trustees' approval of the *work* and their approval of the *payments* is constantly referred to throughout the decision. When, by any act, they signified their *approval of the work*, the *right of the contractors* to immediate payment *became vested* in them.

We also call particular attention to the following extract from the case of the *Newport Co. v. Drew*, supra, page 592:

"By the terms of the contract the work was to be done to the *satisfaction* of the board of trustees, as well as that of the superintendent of construction, and the *approval* by the *trustees* of the several *estimates* when presented operated as an acceptance of the work done on the contract prior to the dates of such approval. Their function, however, was merely to declare their approval or disapproval of the work and to determine its conformity with the terms of the contract, while the function of fixing the

amount of the payment, both under the statute and by the terms of the contract, devolved upon Goff. *Upon their acceptance of the work the contractor became immediately entitled to the payment of the amount of the estimate."* (Italics ours.)

The board of public works is the body under the Charter to *make the contract* on behalf of the city, and to *fix the city's obligations to pay money* thereunder.

The auditing and approval by the several persons and bodies thereafter are only the prescribed steps in the liquidation of the debt. The auditing and approval are ministerial duties, except in so far as they may act as checks upon an unlawful expenditure of funds by the departments.

Sec. 19 (of Article II, Chapter I) provides:

"Except as provided in Chapter III of Article III of this charter, all demands payable out of the treasury must, before they can be approved by the auditor or paid by the treasurer, be first approved by the board of supervisors. All demands for more than two hundred dollars shall be presented to the mayor for his approval, in the manner hereinbefore provided for the passage of bills or resolutions. All resolutions directing the payment of money other than salaries or wages, when the amount exceeds five hundred dollars, shall be published for five successive days (Sundays and legal holidays excepted) in the official newspaper."

The object of the Charter, by requiring different formalities for different amounts, is very apparent. It is not to give materialmen and laborers a chance to file liens, because, in the first place they cannot

file claims of lien against public works; and because, in the second place, they could, under section 1184 of the Code of Civil Procedure, give their notices to withhold *before* they started to furnish material or perform their labor. The intent of the Charter is to give the citizens a chance to protest in case it should appear that the departments are unlawfully expending the public money.

An opinion of Hon. Franklin K. Lane, written while he was our city attorney, throws a clear light upon the functions of the supervisors in these matters:

“The duty imposed upon the board of supervisors of approving all demands upon the funds set aside for departments which are given exclusive control over their appropriations is of purely ministerial character, except in so far as it acts as a check upon such departments against the expenditure of more than its appropriation permits, or protects the city and county against expenditures of an unlawful character. The board of supervisors, at the beginning of each fiscal year, must set aside appropriations for the departments named, and at such time may, by the appropriations so made, limit and control the expenditure of such departments for such fiscal year. But, after such appropriation has been made, responsibility for its expenditure rests entirely on the department to which it is allotted. The legislative department provides the funds, the administrative departments expend them, and each is to be held responsible within its own province. The administrative departments are made responsible for the manner in which the moneys so appropriated are used.” (Opinions of ex-City Attorney Franklin K. Lane [1899-1902], pp. 180, 182—Charter of San Francisco, annotated by W. S. Church, p. 22.)

In conclusion, we desire to state that Welles, in his bill of complaint (p. 10, Tr.), alleges that this fourth progress payment became due on December 5, 1910, on estimate by the city engineer and approval by the board of public works, by its resolution duly made and adopted.

---

#### Point Four—Law of the Case.

Before concluding this brief, we will notice the final point raised by the exceptions of appellees in the Circuit Court of Appeals.

Appellees contended that a certain "memorandum opinion" and minute order of the District Court, dated December 12, 1911 (pp. 113, 114, Tr.), finding that appellee Welles was entitled to the relief demanded in his bill of complaint, were conclusive as the law of the case, and fixed the right of Welles to a final decree in his favor in the absence of new or changed findings by the referee.

Appellant at that time refused to submit its claim to the jurisdiction of the District Court, and set forth the reasons for its refusal in its amended return to the order to show cause issued by the court (pp. 54-61, Tr.). Exceptions were filed to this return (p. 62, Tr.), and the case as it *then* stood was referred to a referee to find the facts (p. 78, Tr.). Upon the report of the referee, to which there was no exception, the "memorandum opinion" and minute order referred to were made. They amounted to



nothing more than the overruling of appellant's objection to the jurisdiction, as that was the only matter before the court, as far as concerned appellant.

The record upon which the "memorandum opinion" was based did not include the answers of the trustee or the bank (p. 93, Tr.). The object of the suit was the trial of a question of title, and the relief asked, and awarded at that preliminary stage of the suit, was injunctive, and mandatory, to preserve the *status quo*, and to insure the power of the court to enforce its ultimate decree (p. 115, Tr.).

The case up to and including December 12, 1911, was still open for the proper decree. On the next day, *December 13*, a formal order (p. 115, Tr.) granting complainant *specific relief*, was made and filed. Then, on the 15th day of December, 1911, a *writ of injunction and mandamus* (p. 116, Tr.) was issued.

No decree having been given or entered upon the "memorandum opinion" and minute order, other than the order of December 13th, which was *signed by the judge*, it must be conclusively presumed that this order, which was the last deliberate direction to the clerk, was the ruling and only ruling, at that stage of the case. This finds ample support in the following authorities:

*Estate of Cook*, 77 Cal. 227, 11 Am. St. Rep. 267;

*Byrne v. Hoag*, 116 Cal. 1;

*O'Brien v. O'Brien*, 124 Cal. 422;  
*Belger v. Sanchez*, 137 Cal. 618.

*Law of the case* applies only to decisions of appellate courts, and it is not only within the power, but it is the duty, of a *nisi prius* court to change its ruling of law during the progress of a case when such ruling was erroneous, and was not followed up by an appealable order.

*Lawrence v. Ballou*, 37 Cal. 521.

But, since the "memorandum opinion" cannot be looked on as stating *the law of the case*, can it be regarded as *res adjudicata* of what was never adjudged?

If the memorandum opinion was ever intended to have the effect contended for by the appellees (which we deny), then the court was at liberty to change that opinion at any time before a decree was entered.

In other words, the lower court is absolutely foot-loose, at all stages of a case pending therein, to change its opinions, until it has deprived itself of the power to do so by the giving and entering of an appealable order or decree, and that order or decree, and not the opinion once held by the court, is the ruling on the matters therein adjudged.

"It is a most common occurrence for a trial court to change its rulings during the progress of a trial, upon questions of law, and no one would contend that it is not within its power

to do so, or that it should not do so when satisfied that its former ruling was erroneous."

*De La Beckwith v. Superior Court*, 146 Cal. 499.

As no *final decree* was ever made or entered on the "memorandum opinion" and minute order of December 12, 1911, (which were merely *directions for a decree*), and as the court changed its opinion and substituted in its place *that of January 18, 1913*, (p. 183, Tr.), which was duly followed by *minute order* (p. 185, Tr.), ordering a decree for the bank in accordance therewith, which was duly followed by a *final decree*, the first and only one in the cause (p. 186, Tr.), the doctrine of *res adjudicata* has no application. See

*Freeman on Judgments* (4th Ed.), Sec. 251.

These observations eliminate *Loewe v. Federation of Labor*, 189 Fed. 714, relied on by appellees in the court below. There, an order for injunction was made and a writ of injunction issued on the preliminary hearing; here, no order was made prior to final decree except that of December 13, 1911. There, the ultimate relief was injunction; here, was involved a question of title, and the preliminary relief was only *collateral* to the issue. There, the opinion of Judge Morrow (139 Fed. 71) announced "*principles*" which Judge Van Fleet found were supported by the facts on final hearing; here, the "memorandum opinion" announces *no principles*.

Again, injunction suits are peculiar in that the ultimate relief is of the same quality as the inter-

locutory relief. Hence, if an interlocutory injunction has been granted after a hearing, and the facts on final hearing support the interlocutory order, there would be merely a *strong reason* for perpetuating the injunction.

But to hold that the "principles announced" in an opinion in a court of *nisi prius* become "the law of the case", as an *absolute rule* binding the action of that court on final hearing, even though error should appear, is not, we submit, supported by authority.

*Rodgers v. Pitt et al.*, 129 Fed. 932;  
*High on Injunctions* (4th Ed.), Sec. 5;  
*Andrae v. Redfield*, 12 Blatchf., p. 425.

Finally, the "memorandum opinion" of December 12, 1911, merely states that \* \* \* "it is my conclusion that the complainant is entitled to the relief demanded in the bill of complaint."

Now, *at the time of this opinion*, what was the relief demanded in the bill of complaint?

It was merely (in substance):

That the auditor be required to surrender the demand on the city treasurer to the trustee;

That the trustee be required to account with complainant;

That the Portuguese-American Bank be required by due process of this court *to make answer to the bill and to assert in this court its claim to said warrant and to abide the judgment of this court*;

That the bank be enjoined from *further proceeding* with its *mandamus suit* in the state court (p. 24, Tr.);

Subsequently, on *April 16, 1912*, complainant, by leave of court, filed an *amended prayer* to his bill of complaint demanding *further and more specific relief* (p. 128, Tr.).

As the answer of the bank was not before the referee, its time to plead not having expired, and as no argument on the merits had been made by appellant before either the referee or the court, a final order or decree of the court upon the merits of the action would have been premature, and it is not to be presumed that the expression of opinion in the memorandum meant anything more than that complainant was entitled to the relief asked for in the order to show cause.

Such was the construction placed upon the "memorandum opinion" by the parties, for the decree that was entered, aside from confirming the report, granted an injunction *pendente lite* against the bank and ordered Auditor Boyle

\* \* \* "to deliver the same (the demand) to defendant John Daniel as trustee herein, to abide the result of this action the proceeds to be distributed to whomsoever *shall be lawfully entitled.*" (Italics ours.)

If this was not the relief to which Mr. Welles was entitled under the "memorandum opinion", then why did he take that decree?

In conclusion, we submit that this highly technical contention of appellees, so persistently urged before Judge De Haven, himself, and by him overruled (p. 128, Tr.); and before Judge Dietrich, and

by him overruled (p. 183, Tr.), is not only unsupported by reason or authority, but is utterly untenable on the record.

While the Circuit Court of Appeals has by its decree reversed the case upon the point first considered in this brief, we have given consideration to the other points urged before it to show that on no view of the case can its decree be sustained.

For all of which reasons we respectfully submit that the decree of the Circuit Court of Appeals herein should be reversed.

San Francisco, California,  
April 1, 1916.

Respectfully submitted,

GEORGE A. KNIGHT,  
CHARLES J. HEGGERTY,  
JAMES B. FEEHAN,  
JOSEPH W. BERETTA,

*Attorneys for Appellant.*



# In the Supreme Court

OF THE  
United States

OCTOBER TERM, 1915

No. [REDACTED]

45

U. S. Supreme Court, D. C.  
FILED  
JUN 3 1916  
JAMES O. MAHER  
CLERK

PORTUGUESE-AMERICAN BANK OF SAN  
FRANCISCO,

*Appellant,*

vs.

PAUL I. WELLES, JOHN DANIEL, Trustee of  
Metropolis Construction Company, Bank-  
rupt, and THOMAS F. BOYLE,

*Appellees.*

## BRIEF FOR APPELLEES.

F. H. DAM,

R. T. DEVLIN,

W. H. DEVLIN,

*Attorneys for Appellee,*

*Paul I. Welles.*

GEORGE J. HATFIELD,

*On the Brief.*

A. F. MORRISON,

P. F. DUNNE,

W. I. BROBECK,

MILTON J. GREEN,

*Attorneys for Appellee,*

*John Daniel, as Trustee, etc.*

Filed this \_\_\_\_\_ day of May, 1916.

JAMES D. MAHER, Clerk.

Deputy Clerk

## INDEX.

	Page
Statement of Facts and Questions Involved.....	1
I. A provision in a contract between a municipality and another rendering a claim for moneys due from a municipality unassignable without the consent of a municipality is valid.....	
	4
A. Parties to a contract may validly provide that it shall not be assigned.....	
	4
B. Such a provision is not a restraint on alienation	
	8
C. Insurance cases not in point.....	
	11
D. Parties may validly prohibit assignment of moneys due under contract.....	
	15
E. In contracts of municipality additional reasons for holding valid prohibition of assignments of moneys due thereunder.....	
	21
II. A provision rendering moneys due under a contract unassignable either legally or equitably is not merely for the benefit of the municipality, but renders invalid an attempted assignment, without such a consent .....	
	31
A. This rule has been established by the Supreme Court of the United States.....	
	31
B. Interest of municipality demands that subcontractor be protected against assignments of moneys without consent of municipality.....	
	40

## List of Cases Cited.

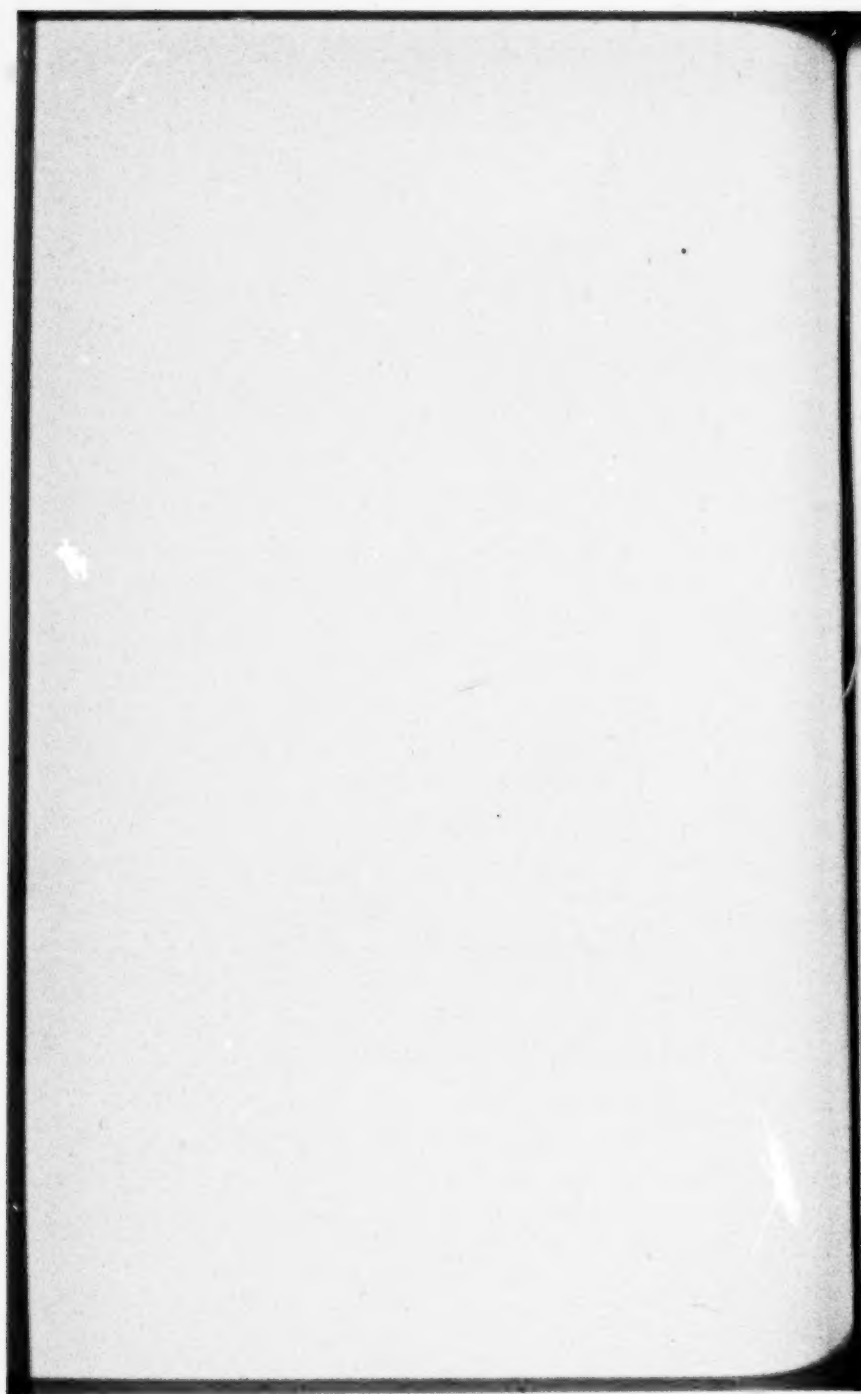
	Pages
<i>American Bonding, etc., Co. v. Baltimore, etc., R. Co.</i> , 124	
Fed. 866; 60 C. C. A. 52.....	5, 7
<i>American Surety Co. v. Pauly</i> , 170 U. S. 133 at 144; 18	
Sup. Ct. 552.....	12
<i>Andrew v. Meyerdirck</i> , 87 Md. 511; 40 A. 173.....	8
<i>Arkansas Valley Smelting Co. v. Belden Co.</i> , 127 U. S.	
379; 32 L. ed. 246; 8 Sup. Ct. Rept. 1308.....	18
 <i>Barringer v. Bes Line Constr. Co.</i> , 23 Okla. 131; 99	
Pac. 775.....	6, 8, 16
<i>Bonds-Foster Lumber Co. v. Northern Pac. R. Co.</i> , 53	
Wash. 101, 877.....	8
<i>Bradley v. Pierotto</i> , 3 Des. Jr. 324.....	9
<i>Burck v. Taylor</i> , 152 U. S. 634; 14 S. Ct. 696; 38 U. S.	
(L. ed.) 578.....	5, 31, 32, 33, 34, 35, 36, 37, 38, 39
 <i>Carter v. State</i> , 8 S. D. 153; 65 N. W. 422.....	6, 8
<i>City of Omaha v. Standard Oil Co.</i> , 55 Neb. 337; 75 N. W.	
859 .....	5, 19, 25, 26, 28, 29
<i>Civil Code of Cal.</i> , Sec. 711.....	9, 11
<i>Corpus Juris</i> 5, 874-876 .....	7
 <i>Deffenbaugh v. Foster</i> , 40 Ind. 382.....	7
<i>De Vita v. Loprete</i> , 77 N. J. Eq. 553; 77 Atl. 536; Ann.	
Cas. 1912A 362.....	6
<i>Devlin v. New York</i> , 63 N. Y. 9; 50 How. Pr. 1, modifying	
48 How. Pr. 457.....	5, 8
<i>Durr v. State</i> , 59 Ala. 24.....	16
 <i>Encyl. Law &amp; Practice</i> (5), 912.....	4
<i>Everson v. Gere</i> , 40 Hun. 248, affirmed 122 N. Y. 290;	
25 N. E. 492.....	6
 <i>Fraser v. Canadian Pac. Ry. Co.</i> , 19 West. L. R. 369.....	8
 <i>Goodman v. Niblach</i> , 102 U. S. 556.....	34
 <i>Hall v. O'Neil Turpentine Co.</i> , 56 Fla. 324, 336; 47 S.	
609; 16 Ann. Cas. 738.....	7
<i>Hobbs v. McLean</i> , 117 U. S. 567, 576.....	33, 36

# LIST OF CASES CITED.

iii

Pages

<i>La Rue v. Groezinger</i> , 84 Cal. 281; 24 Pac. 42; 18 Am. St. Rep. 179 .....	5, 7, 9, 10
<i>Leader Printing Co. v. Lowry</i> , 9 Okla. 89; 59 Pac. 242.....	6
<i>Let v. Guardian Fire Ins. Co.</i> , 125 N. Y. 82; 25 N. E. 1088	13
<i>Liverpool &amp; London &amp; Globe Ins. Co. v. Kearney</i> , 180 U. S. 132; 45 L. ed. 460.....	12
<i>Lockerby v. Amon</i> , 64 Wash. 24; 116 Pac. 463; Ann. Cas. 1913A, 228; 35 L. R. A. (N. S.) 1064.....	7, 8
<i>Mueller v. Northwestern University</i> , 195 Ill. 236; 63 N. E. 110; 88 Am. St. Rep. 194.....	5, 6, 7
<i>Municipal Corporation</i> , 5th ed., Vol. 1, Sec. 248, p. 467..	22
<i>Murphy v. Plattsmouth</i> , 78 Neb. 163; 110 N. W. 749. 19, 30, 26, 29	
<i>Murray v. Green</i> , 64 Cal. 363.....	9
<i>New England Loan &amp; Trust Co. v. Kenneally</i> , 38 Neb. 895; 57 N. W. 759.....	13
<i>Omaha v. Standard Oil Co.</i> , 55 Neb. 337; 75 N. W. 859 .....	5, 19, 26, 28, 29
<i>Richards on Ins. Law</i> , (3rd ed.) par. 90, p. 111.....	12, 13
<i>R. C. L.</i> (2), par. 6, page 599.....	6
<i>Sargent Glass Co. v. Matthews Land Co.</i> , 35 Ind. App. 45; 72 N. E. 474.....	5
<i>Spare v. Home Mutual Insurance Co.</i> , 17 Fed. 658.....	14
<i>Stanley v. The Sheffield Land, Iron &amp; Coal Co.</i> , 83 Ala. 261; 4 Southern 44.....	16
<i>State ex rel. Kansas City Loan Guarantee Co. v. Kent</i> , 98 Mo. Ap. 281; 71 S. W. 1066.....	19, 27, 30
<i>Swartz v. Narragansett Elec. Lighting Co.</i> , 26 R. I. 388; 59 A. 77 (rearg den 26 R. I. 436; 59 A. 111).....	8
<i>Tabler v. Sheffield Land, etc. Co.</i> , 79 Ala. 377; 58 Am. R. 593 .....	7, 15, 19
<i>Thompson v. The Insurance Company</i> , 156 U. S. 1087; 10 Sup. Ct. 1019.....	12
<i>Wabash R. Co. v. Smith</i> , 134 Ill. App. 574.....	5
<i>Wakefield v. American Surety Co.</i> , 209 Mass. 173; 95 N. E. 350 .....	8
<i>Zetterlund v. Texas Land, etc. Co.</i> , 55 Neb. 355; 75 N. W. 860 .....	5, 8, 19



**In the Supreme Court**  
OF THE  
**United States**

---

OCTOBER TERM, 1915  
No. 248

---

PORTUGUESE-AMERICAN BANK OF SAN  
FRANCISCO,

*Appellant,*

vs.

PAUL I. WELLES, JOHN DANIEL, Trustee of  
Metropolis Construction Company, Bank-  
rupt, and THOMAS F. BOYLE,

*Appellees.*

**BRIEF FOR APPELLEES.**

---

**Statement of Facts and Questions Involved.**

The controversy herein involves a fund of \$6,830.85 which became payable as the fourth progress payment to the Metropolis Construction Company for work in constructing a sewer under a contract with the Board of Public Works of the City and County of San Francisco.



The Portuguese-American Bank of San Francisco, the appellant, claims under an assignment made to it by the Metropolis Construction Company as security for loans. Paul I. Welles, one of the appellees, claims as a subcontractor, asserting a claim in the nature of a garnishment acquired by giving notice under the provisions of Section 1184 of the Code of Civil Procedure of the State of California. John Daniel, as trustee of the bankrupt Metropolis Construction Company, unites in the claim of Welles.

The specifications annexed to the contract under which the work was done, and referred to in the contract and made a part thereof, contain, amongst others, the following provisions:

“Subcontracts: The contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control; *and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof without the consent or authorization of the board of public works.*

With his request to the board of public works for permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such subcontractor as he intends employing together with such other information as will enable the board of public works to determine the responsibility and standing of said subcontractor.

No subcontractor will be considered unless the original contract between the contractor and the board of public works is made a part thereof, nor unless it appears to the board of public works that the proposed subcontractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sublet, and to complete said work in accordance with these specifications and to the satisfaction of the board of public works.

No subcontract shall relieve the contractor of any of his liabilities or obligations under this contract. *He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the board of public works.*" (p. 136 Tr.).

The assignment under which the Portuguese-American Bank asserts its rights was made on December 5th, 1910. The notices to withhold payment under which the appellee Welles claims were given on December 12th and 16th, 1910. The assignment under which the appellant claims being prior in time to the notices to withhold under which the appellee Welles claims, the appellant would be entitled to the fund if the assignment is valid. The appellees, however, submit that the assignment is not valid in that the contract in express terms provides that the contractor "shall not either legally or equitably assign any of the moneys payable under this contract, or his claim thereto, unless with the like consent of the board of public works", and in that the board of public works neither knew nor consented

to the assignment. It must always be borne in mind that the contract here was between the board of public works, acting for and on behalf of the City and County of San Francisco, on the one side. The obligation to pay, here attempted to be assigned, was that of a municipality. The questions, therefore, presented to this court are:

1. Whether a provision in a contract between a municipality and another, rendering a claim for moneys due from the municipality unassignable without the consent of the municipality, is valid.

2. Whether such a provision is merely for the benefit of the municipality.

---

## I.

**A PROVISION IN A CONTRACT BETWEEN A MUNICIPALITY AND ANOTHER RENDERING A CLAIM FOR MONEYS DUE FROM A MUNICIPALITY UNASSIGNABLE WITHOUT THE CONSENT OF A MUNICIPALITY IS VALID.**

**A. Parties to a Contract May Validly Provide that It Shall Not be Assigned.**

Parties to a contract may validly prohibit its assignment or the assignment of the benefits thereunder. The general rule is thus stated in *5 Encyc. of Law & Practice* at page 912:

“The parties to a contract may in terms prohibit its assignment so that neither personal representatives nor assignees can succeed to any rights in virtue of it or be bound by its obligations, and a transfer in such a case creates a

simple personal obligation which can be enforced against the assignor alone." Citing—

- (U. S.) (a) *Burck v. Taylor*, 152 U. S. 634;  
14 S. Ct. 696; 38 U. S.  
(L. ed.) 578;
- (b) *Amer. Bonding, etc., Co. v. Baltimore, etc., R. Co.*, 124 Fed.  
866; 60 C. C. A. 52;
- (Cal.) (c) *La Rue v. Groezinger*, 84 Cal.  
281; 24 Pac. 42; 18 Am. St.  
Rep. 179;
- (Ill.) (d) *Mueller v. Northwestern University*, 195 Ill. 236; 63 N. E.  
110; 88 Am. St. Rep. 194,  
citing this proposition from  
2 Am. & Eng. Enc. of Law  
(2nd ed.) 1035;
- (e) *Wabash R. Co. v. Smith*, 134  
Ill. App. 574;
- (Ind.) (f) *Sargent Glass Co. v. Matthews  
Land Co.*, 35 Ind. App. 45;  
72 N. E. 474;
- (Neb.) (g) *Omaha v. Standard Oil Co.*, 55  
Neb. 337; 75 N. W. 859;
- (h) *Zetterlund v. Texas Land etc.,  
Co.*, 55 Neb. 355; 75 N. W.  
860;
- (N. Y.) (i) *Devlin v. New York*, 63 N. Y.  
9; 50 How. Pr. 1, *modifying*  
48 How. Pr. 457;

- (j) *Everson v. Gere*, 40 Hun. 248,  
affirmed 122 N. Y. 290; 25  
N. E. 492;
- (Okla.) (k) *Leader Printing Co. v. Lowry*,  
9 Okla. 89; 59 Pac. 242;
- (l) *Barringer v. Bes Line Constr.*  
*Co.*, 23 Okla. 131; 99 Pac.  
775;
- (S. D.) (m) *Carter v. State*, 8 S. D. 153; 65  
N. W. 422.

In 2 *R. C. L.*, paragraph 6, page 599, it is said:

"The parties to a contract may, however, expressly prohibit its assignment, and such stipulation will be recognized and enforced by the courts, and it is not material that the stipulation is limited to the prevention of the assignment of the contract to a designated individual, nor does a statute which, in general terms, makes contracts assignable or enlarges the instances in which they may be assigned have the effect of nullifying stipulations which the parties themselves may make on the subject. In case of the assignment of such a contract all that is acquired by an assignee is the right to maintain an action for damages against the assignor."

Citing—

- (Ill.) (d) *Mueller v. Northwestern Uni-*  
*versity*, *supra*;
- (N. J.) (n) *De Vita v. Loprete*, 77 N. J.  
Eq. 533; 77 Atl. 536, Ann.  
Cas. 1912A 362 and note;

- (Wash.) (o) *Lockerby v. Amon*, 64 Wash. 24; 116 Pac. 463, Ann. Cas. 1913A 228 and note, 35 L. R. A. (N. S.) 1064;
- (Cal.) (c) *La Rue v. Groezinger*, supra.

In 5 *Corpus Juris*, pages 874 through 876, the rule is stated thus:

"It is a general rule \* \* \* that the rights of one party to a contract to its performance by the other may be assigned unless such assignment is forbidden or unauthorized by statute or by the terms of the contract itself. The parties to a contract may in terms prohibit its assignment so that neither the personal representatives nor assignees can succeed to any rights in virtue of it nor be bound by its obligations, and an attempted transfer in such a case creates a simple personal obligation which can be enforced only against the assignor." Citing:

- (U. S.) (b) *Amer. Bonding etc., Co. v. Baltimore, etc., R. Co.*, supra;
- (Ala.) (p) *Tabler v. Sheffield Land, etc., Co.*, 79 Ala. 377; 58 Am. R. 593;
- (Fla.) (q) *Hall v. O'Neil Turpentine Co.*, 56 Fla. 324, 336; 47 S. 609; 16 Ann. Cas. 738 (citing *Cyc.*);
- (Ga.) (d) *Mueller v. Northern Univ.*, supra;
- (Ind.) (r) *Deffenbaugh v. Foster*, 40 Ind. 382;



- (Md.) (s) *Andrew v. Meyerdirck*, 87 Md. 511; 40 A. 173;
- (Mass.) (t) *Wakefield v. American Surety Co.*, 209 Mass. 173; 95 N. E. 350;
- (Nebr.) (h) *Zetterlund v. Texas Land, etc., Co.*, supra;
- (N. Y.) (i) *Devlin v. Mayor*, supra;
- (Okla.) (l) *Barringer v. Bes Line Constr. Co.*, supra;
- (R. I.) (u) *Swartz v. Narragansett Elec. Lighting Co.*, 26 R. I. 388; 59 A. 77 (rearg den 26 R. I. 436, 59 A. 111);
- (S. D.) (m) *Carter v. State*, supra;
- (Wash.) (o) *Lockerby v. Amon*, supra;
- (v) *Bonds-Foster Lumber Co. v. Northern Pac. R. Co.*, 53 Wash. 101, 877;
- (Man.) (w) *Fraser v. Canadian Pac. Ry. Co.*, 19 West L. R. 369.

**B. Such a Provision Is Not a Restraint on Alienation.**

The appellant contends that moneys due under a contract constitute a debt which is rightfully subject to free alienation, and that a provision in a contract rendering moneys due under it non-assignable without consent is void as a restraint on alienation by the laws of California. Counsel bases his argument upon certain insurance cases, holding that a

provision in an insurance contract prohibiting assignments after loss invalid and upon certain code sections of the State of California.

Section 711 of the Civil Code of the State of California provides

“Conditions restraining alienation, when repugnant to the interest created, are void.”

As stated in appellant's brief, page 59, this provision has been decided to be merely declaratory of the common law by the Supreme Court of the State of California.—In *Murray v. Green*, 64 Cal. 363 at 366.

We find no instance in which the rule declaring that conditions restraining alienation, when repugnant to the interest created, are void, was applied to contracts prohibiting their assignments. The rule is usually applied to an attempted restraint on the alienation of estates in real property, such as the case of *Murray v. Green*, supra, cited by appellant. It is true that the rule has also been extended to attempted restraints on alienation of tangible personal property, as in the case of *Bradley v. Piexotto*, 3 Ves. Jr. 324, cited by appellant, but this is the limit of the application of the rule. It has never been applied so as to render void inhibitions against assignments contained in contracts themselves. The Supreme Court of the State of California, in *La Rue v. Groezinger*, 84 Cal. 281 at 283, in relation to this matter said:

"These sections seem to do away with whatever restrictions there may formerly have been upon the power of the parties to assign their ordinary contracts. It is clear, however, that the provision cannot be construed to render assignable all contracts whatever, regardless of their nature or effect; but must be taken with some qualification. *In the first place, it is not intended to render null any agreement that the parties may have made on the subject.* Hence, if the contract itself provides in terms that it is not transferable, it certainly cannot be transferred, although it otherwise might be so."

That a contract may by its very terms prohibit its assignment is a well established general rule of the common law, as shown by the encyclopedic quotations given and the cases there cited.

The interest of parties under a contract arises by virtue of the consent of the parties thereto. The interest is created by the act of the parties in giving that consent. Since the interest created depends upon the consent of the parties, no reason appears why they cannot limit that interest by limiting their consent. If the parties desire to create an interest which is not transferable, it is submitted that they have not violated the rule making conditions restraining alienation, when repugnant to the interest, void.

The property interest of the owner of an estate in real property or of tangible personalty is defined and prescribed by law. The rights, powers and privileges of a fee simple or life estate in real property, or of the absolute ownership of tangible per-

sonal property does not depend on the acts or consent of persons. The incidents or attributes of those interests are defined by law. It is true that ordinarily consent must be obtained to effectuate a transfer of those interests, but the incidents of the interests themselves do not depend upon such a consent. The incidents of the interests are defined by law.

The rights arising out of a contract, however, are not in this category. The incidents or attributes of the interest depend upon the consent of the parties, and the consent of the parties governs. Therefore, it is submitted that Section 711 of the Civil Code has no application to contracts which themselves prohibit their assignment. The interests created are limited in their creation. No attempt is made to limit an interest created by law.

#### **C. Insurance Cases Not in Point.**

Appellant cites a number of insurance cases, holding ineffectual a provision in the policy of insurance that an assignment, either before or after loss, should be void, insofar as it concerned an assignment of the right to recover on the policy after loss had been sustained. It will be admitted that there is certain language contained in these decisions which tends somewhat to support the contention of appellant. It is submitted, however, that these cases are not in point. They are to be distinguished because of the peculiar nature of insurance contracts.

The contract of insurance is a unilateral contract, formed mainly in the interest of the insurers, the

insured being compelled to accept the form offered in order to secure insurance. The construction is always liberal to the insured.

*Richards on Ins. Law* (3rd ed.), Par. 90, page 111;

*Liverpool & London & Globe Ins. Co. v. Kearney*, 180 U. S. 132; 45 L. Ed. 460;

*Amer. Surety Co. v. Pauly*, 170 U. S. 133 at 144; 18 Sup. Ct. 552;

*Thompson v. The Insurance Company*, 156 U. S. 1087; 10 Sup. Ct. 1019.

In *Liverpool & London & Globe Insurance Company v. Kearney*, supra, Mr. Justice Harlan said in part at 136:

"The argument in behalf of the defendant assumes that the insurance company is entitled to the literal interpretation of the words of the policies, but the rules established for the construction of written instruments apply to contracts of insurance equally with other contracts. \* \* \* To the general rule there is an apparent exception in the case of contracts of insurance, namely, that where a policy of insurance is so formed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer. The exception rests upon the ground that the company's attorneys, officers or agents prepared the policy and it is its language that must be interpreted."

An insurance policy is peculiarly one of a personal nature. The insurance company may be willing to insure one man against a certain loss and not insure another. For this reason it is held that

even without express prohibition in the policy a policy of fire insurance is not assignable except with the consent of the insurer.

*Richards on Ins. Law* (3rd ed.) Par. 268 at page 353;

*New Eng. Loan & Trust Co. v. Kenneally*, 38 Neb. 895; 57 N. W. 759;

*Let v. Guardian Fire Ins. Co.*, 125 N. Y. 82; 25 N. E. 1088.

In *Let v. Guardian Fire Ins. Co.* (supra), Justice Gray, in rendering the opinion of the court, said:

"The policy of insurance is distinctly a personal contract by which the insurer undertakes to indemnify the party named in the writing against loss in a manner and subject to the conditions therein described. The obligation does not pass with the insured property to an assignee or purchaser thereof without the consent of the insurer. Such a consent alone can keep in life this agreement. This is a rule which is of long standing and needs no discussion."

In *New England Loan & Trust Company v. Kenneally*, Justice Harrison, in rendering the opinion of the court, said:

"The general rule of law is that a policy of fire insurance is a personal contract with the party insured and does not run with the land or pass to the purchasers by a sale of the premises or property insured, and any assignment of the policy must be with the knowledge and consent of the insurer. After loss the personal nature of the contract has to a large extent gone. The element of personal risk no longer exists and all that remains to be done is the payment of the money by the insurance company."



As stated in *Spare v. Home Mutual Insurance Company*, 17 Fed. 658, cited by appellant, pointing out the true ground of this distinction—

“But the stipulation that the policy shall be void if so assigned (without consent) after the fire, stands on a different footing. When the proof of loss was made and the liability of the defendant under the policy fixed the relations between the parties was changed from insurer and insured to that of debtor and creditor, and the *delectus personae* of the contract was no longer material.”

It is believed that these insurance cases are to be distinguished because of the rule requiring the insurance contracts to be construed against the insurer. If they are not to be distinguished on some such ground they are clearly contrary to the general rule and the weight of authority, to the effect that contracts made by their very terms validly prohibit their assignment.

The appellant suggests that the true basis of these insurance cases is that after loss all that remains is the obligation of the insurer to pay the insured the amount of the loss. In others words, that after loss there exists merely a chose in action in favor of the insured against the insurer to recover a sum of money, to wit, the amount of the loss, and this is assignable. This argument has been advanced in a number of other cases in which there was an attempted assignment of an obligation to pay money in the face of an express prohibition of such an

assignment in the contract giving rise to the obligation to pay the money.

**D. Parties May Validly Prohibit Assignment of Moneys Due Under Contract.**

In *Tabler v. Sheffield Land, Iron & Coal Company*, 79 Ala. 377; 58 Amer. Rep. 593, the appellants as plaintiff in a court below brought action against the appellees to recover a certain amount alleged to be due them as transferees of a large number of labor tickets or time checks issued by the defendant. The instruments were printed and were denominated on their face as being a labor ticket. All of these tickets were payable June 15, 1884, "to employees only" and are endorsed "not transferable". The lower court on demurrer to the complaint held that the action would not lie because the labor tickets provided that they were not assignable. This ruling was sustained by the Supreme Court of Alabama, which said in part—

"We are of the opinion that this ruling was free from error. The certificates show, on their face, that they are payable to the employees only, and to no one else. They are expressly declared not to be transferable, which negatives any promise of defendant otherwise implied, that payment would be made to any assignee or transferee of the holders. They were issued with this express understanding, which was assented to by the employees when they received them; and the plaintiffs took the instruments with full notice of this restriction, because it appeared on the face of the paper. The transferability of the paper was thus destroyed by

the consent of the original parties to it. *Durr v. State*, 59 Ala. 24.

It cannot be said that the policy of the law is opposed to the restriction thus imposed. On the contrary, under the peculiar circumstances of this case it highly favors such restriction."

In *Stanley v. The Sheffield Land, Iron & Coal Company*, 83 Ala. 261; 4 Southern 44, the case last cited was followed.

In *Barringer v. Bes Line Construction Co.* (1) supra, the Oklahoma court, in the most thoroughgoing and instructive decision upon this subject, held a similar time check non-assignable, the court saying in part—

"The only question presented by the record in this case is whether the time checks sued upon are assignable. The language of these certificates and of the agreements executed by the payees at the time they received the time certificates is not ambiguous. It is clear that it was the intention of the construction company to stipulate, and of the payees of the time checks to agree, that they should not be assigned; and unless there is some provision of law that renders this part of the contracts inoperative, plaintiff in error was not entitled to recover. It is the contention of plaintiff in error, that Par. 4163, Wilson's Rev. & Anno. Stat., which reads, 'a thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner', has this effect. The only authority cited by plaintiff in error that is applicable and supports his contention is the case of *Bewick Lumber Co. v. Hall*, 94 Ga. 539, 21 S. E. 154. In that case it was sought to recover upon a credit check which contained a stipulation that it was

not transferable. The court held, under a statute providing that all choses in action arising upon a contract were assignable, so as to vest the title in the assignee, that the action could be maintained. The opinion is very brief. The court neither assigns reasons nor cites authorities in support of the conclusion which it reached. In our opinion this case is against the weight of authorities. At common law rights arising out of contracts, except certain classes, to which belonged negotiable instruments, were not assignable without the consent of the adverse party. The right of an assignee, however, was recognized and enforced in courts of equity where the assignor refused to permit the assignee to bring an action at law in the assignee's name. Under the influence of the doctrine of the equity courts, the common-law rule became a mere rule of pleading, in that an assignment of contractual rights could not be made so as to authorize the assignee to maintain suit in his own name. But this rule, in most jurisdictions, has now been modified until an assignee can maintain an action in his own name. The change has been due largely to statutes which may be divided into two classes: One class, consisting of statutes similar to ours, providing that choses in action may be transferred; and the other class, providing that an action must be brought in the name of the real party in interest. 3 Page, *Contr.* p. 1935. The same author, on page 1936 of the same volume, in discussing what contracts may be assigned, excepts therefrom the following three classes: Personal contracts; contracts containing a provision against assignment; and contracts forbidden by statute to be assigned. The effect of plaintiff in error's contention is that Par. 4163, *Wilson's Rev. & Anno. Stat.*, *supra*, not only authorizes assignment of choses in action arising out of contracts, but forbids the execution of contracts in

which it is stipulated that no assignment may be made. We are unable to concur in this contention. The purpose of this statute was not to prohibit parties from contracting that their contracts shall not be assignable. The intention of this statute and of similar statutes, as they exist in other states, is to remove the restriction of the common-law rule upon choses in action which prevented their transfer, and to permit the assignee to maintain suit in his own name."

The Oklahoma court then cites the language of Mr. Justice Gray of the Supreme Court of the United States in *Arkansas Valley Smelting Company v. Belden Co.*, 127 U. S. 379; 32 L. ed. 246; 8 Sup. Ct. Rep. 1308, to the following effect:

"'At the present day, no doubt, an agreement to pay money or to deliver goods may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable; but everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent.' The doctrine announced in this case is approved in *Delaware County v. Diebold Safe & Lock Co.*, 133 U. S. 473, 33 L. ed. 674, 10 Sup. Ct. Rep. 399, and in *Burck v. Taylor*, 152 U. S. 635, 38 L. ed. 578, 14 Sup. Ct. Rep. 696."

The court then goes on to discuss the effect of the payees of the time checks accepting the same, saying in part:

“In the case at bar the payee of each time check had an open account with the construction company before his acceptance of the time check in payment thereof, which could be assigned; but the time check is a new and independent contract from the contract of the payee and of the construction company on open account. That the construction company did not desire to deal upon the certificate with any other person than the payee is expressly indicated by the language of the contract, and assented to by the payee, not only by his acceptance of the contract containing a stipulation that it shall be nontransferable, but also by his affirmative act in signing an agreement to that effect. What might have been the reason of the construction company for desiring to deal with no other person under those contracts than the payees therein is unnecessary for us to conjecture. The argument that the payee in the time check was in better condition before accepting the time check in settlement of his rights under the open account is without force. Evidently the payee did not think so, or he would not have entered into this second contract in full settlement of his rights under the former contract.”

The court then cited and discussed at length the case of *Omaha v. Standard Oil Co.* (g) supra, which will be more extensively dealt with later on. It then cites *Zetterlund v. Texas Land etc. Co.*, (h) supra, and *Murphy v. Plattsmouth*, 78 Neb. 163; 110 N. W. 749. The court then cites, with approval, and examines at length *State ex rel. Kansas City Loan Guarantee Company v. Kent*, 98 Mo. App. 281; 71 S. W. 1066, which will be examined later. It then cites with approval *Tabler v. Sheffield Land, Iron & Coal Company*, above discussed, saying in part:



"In that case an action was brought by the assignee of a labor ticket in which it was stipulated that the ticket should not be transferable, and should be payable to employee only. The court held that the agreement of the parties that the same should not be transferable destroyed the right of the payee therein to assign the same, and that the assignee could not recover. In the case at bar the payee of each time check had with the construction company a contract of employment, the terms of which do not appear from the record. On this contract (whether oral or written does not appear) the construction company became indebted to each employee on open account for services performed, and most of the employees became indebted to the construction company for board, supplies, and other material furnished. The employee's right under his open account was assignable; but he by contract with the construction company settled his rights under the open account by accepting therefor the time check. The rights of the parties under the contract made by them are not to be determined by whether one or the other is in a better position than before he made it, but whether they had the capacity to make it, and the contract made is not forbidden by law. The construction company agreed to execute a time check in settlement of its obligations under the open account, upon the condition that the time check should not be assignable, and should be presented in person, and payment thereof receipted in person by the payee therein. The employees accepted this written obligation of the construction company in preference to, and in settlement of, the obligation of the company under the open account. There is no contention that the payees of the time checks have performed their part of the agreement by presenting the checks for payment and offering to receipt for same."

It next dealt with the proposition that the provision prohibiting the assignment of a contract was contrary to public policy, saying in part:

"It is argued that this contract is contrary to public policy; but it has not been made to appear in what respect it is injurious to the public, nor does it appear to be in violation of any statutory provision or any rule of the common law. The statute does not forbid such contracts, and at common law choses in action were not alienable even without a stipulation that they should not be alienable; and the assignments of the certificates in this case are in violation of the contracts, and are therefore void as between the maker of the certificates and the assignees."

From these authorities it is evident that the general rule is that contracts may validly prohibit their assignment or the assignment of any moneys due under the contracts. The insurance cases cited by appellant to the effect that insurance companies cannot limit the power of the insured to assign the benefits of the policy after loss has been sustained must either be considered an exception to the general rule because of the peculiar nature of insurance policies, or be considered contrary to the general rule and the weight of authority.

**E. In Contracts of Municipality Additional Reasons for Holding Valid Prohibition of Assignments of Moneys Due Thereunder.**

Conceding that the general rule that contracts may properly prohibit their assignment or the assignment of moneys due thereunder be erroneous,

and conceding that the rule which appellant claims the insurance cases stand for, to wit, that where attempted to be assigned is merely a chose in action to recover money, the free alienation of the same cannot be restricted by contract, it is submitted that the case at bar would be an exception to such a rule. In the case at bar we are not dealing with the obligation to pay of an ordinary individual. We are dealing with the obligation of a municipality. The obligation of a municipality stands on an entirely different footing than the obligation of an ordinary individual. This distinction is indicated by the well known rule that municipal revenues are exempt from judicial seizure for debts. Speaking in this regard, Judge Dillon, in his work on *Municipal Corporations*, 5th ed., Volume 1, Section 248, page 467, says:

“Municipal corporations are instituted by the supreme authority of a State for the public good. They exercise by delegation from the legislature a portion of the sovereign power. The main object of their creation is to act as administrative agencies for the State and to provide for the police and local government of certain designated civil divisions of its territory. To this end they are invested with certain governmental powers and charged with civil, political, and municipal duties. To enable them beneficially to exercise these powers and discharge these duties, they are clothed with the authority to raise revenues, chiefly by taxation, and subordinately by other modes, as by licenses, fines, and penalties. The revenue of the public corporation is the essential means by which it is enabled to perform its appointed

work. Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed, and the ends of its erection thwarted. Based upon considerations of this character, it is the settled doctrine of the law that not only the public property but also the taxes and public revenues of such corporations cannot be seized under execution against them, either in the treasury or when in transit to it. Judgments rendered for taxes, and the proceeds of such judgments in the hands of officers of the law, are not subject to execution unless so declared by statute. The doctrine of the inviolability of the public revenues by the creditor is maintained, although the corporation is in debt, and has no means of payment but the taxes which it is authorized to collect."

Upon similar considerations of public policy municipal corporations and their officers are not subject to garnishment to reach and apply moneys owing by them to third persons to the payment of debts of the latter although private corporations equally with natural persons are liable to this process. As stated by Judge Dillon in paragraph 249, Volume 1, page 469,

"This exemption is usually placed upon *grounds of public policy* based upon the following considerations. Municipal corporations are, to a large extent, in the exercise of governmental powers; they control pecuniary interests of great magnitude, and to permit the public duties of these corporations to be imperfectly performed in order that individuals may the better collect their private debts is to pervert the objects of their creation. If a city cannot, at short intervals, make a settlement of its multitudinous accounts, but is liable to be drawn into court

at the suit of every creditor of those to whom it owes money, it will not only be engaged in much expensive and vexatious litigation in which it has no interest, but, if unable to pay safely the money which it owes, it may lose the services of persons that may be of much value. A municipal corporation exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits in order that one private individual may the better collect a demand due from another. Upon considerations, such as these, numerous cases in various States hold that debts owing by a municipality cannot be made the subject of garnishment in the absence of express statutory enactment subjecting them to the process."

The reasons of public policy exempting municipal revenues from judicial seizure for debts, and exempting municipal corporations and their officers from garnishment of moneys owing by them to third persons, apply with equal force to render valid a contractual provision against the assignment of moneys owed by it without its consent. Just as much reason exists for exempting a city, when it has so contracted, from expensive and vexatious litigation with assignees of the municipality's creditor as with garnishing creditors of the municipality's creditor. There is no more reason to require a municipality to consume the time of its officers or the money in its treasuries in defending suits against rival assignees of the municipality's creditor, than to require it to consume the time of its officers or the money in its treasuries in defending suits against garnishing creditors of the municipality's creditor.

In *City of Omaha v. Standard Oil Company*, (g) supra, this point is emphasized. In that case it appeared that the Metropolitan Street Lighting Company entered into a written contract with the City of Omaha to light certain of its streets with gasoline lamps for the period of two years. The consideration was to be paid in monthly installments. The Standard Oil Company, the plaintiff in said suit, furnished the necessary oil, and at one time loaned a considerable sum of money to the lighting company to enable it to carry out its contract with the city, and to secure an indebtedness thus incurred, the lighting company assigned to the plaintiff the moneys due under the contract for the month of October, 1892. The contract between the city and the Metropolitan Street Lighting Company expressly prohibited the assignment of the contract without the assent of the city. The court held that this provision made the assignment by the Metropolitan Street Lighting Company to the Standard Oil Company void, saying in part:

"Counsel for the plaintiff insists that this stipulation was directed against the assignment of the obligation resting on the Lighting Company to perform the work required by the contract, and was not intended to prevent an assignment of the money to be earned thereunder. That view was accepted by the trial court, but we think it is not warranted by a just interpretation of the language employed. The inhibition, it will be noticed is not alone upon the assignment of the obligation to light the streets, but upon the assignment of the contract. What was the contract between the



parties? Certainly one of its important elements was the duty laid upon the city to make monthly payments to the Lighting Company for the services rendered, and another was the correlative right of the company to receive such payments. The assignment of the October installment, if valid, not only transferred to the plaintiff a right secured to the Lighting Company by the contract, but affected as well, an important obligation on the part of the city. It compelled the city to deal with strangers, and to determine at its peril which of the contesting claimants was entitled to the fund. This may have been one of the very contingencies contemplated by the city, and against which it sought to provide by making the contract non-assignable."

In *Murphy v. City of Plattsmouth*, 78 Neb. 163; 110 N. W. 749, the plaintiff brought suit against the City of Plattsmouth to recover a small balance due on a written contract made between the defendant city and one Fanning, for the paving of certain streets in that city. The plaintiff claimed the balance as Fanning's assignee. The contract between the city and Fanning in express terms prohibited its assignment without the consent of the city. The court held that this assignment was invalid on the authority of *Omaha v. Standard Oil Company*, (g) supra, saying in part:

"In *City of Omaha v. Standard Oil Co.*, 55 Neb. 337, 75 N. W. 859, the plaintiff claimed as assignee under a contract containing a stipulation of this character, and this court held that the contract was non-assignable. *Counsel there advanced the proposition that the stipulation was merely directed against the assignment of the obligation resting upon the*

*assignor by virtue of the contract, and was not intended to prevent an assignment of the money to be earned thereunder. But this court refused to adopt that view; and after speculating to some extent as to the object of the stipulation, disposed of the matter in these words: 'But it is needless for us to speculate on the motives for the city's action. It is enough for us to know—whatever its reasons may have been—that it has, in plain language, stipulated against an assignment of the contract. That stipulation is valid and must be enforced. To hold that it covers some, but not all, of the rights and obligations arising out of the contract, would be, it seems to us, an inexcusable perversion of its terms'."*

In *State ex rel. Kansas City Loan Guarantee Co. v. Kent*, 98 Mo. Ap. 281; 71 S. W. 1066, the relator sued as the assignee of an account of \$8.75 for labor in the stables of the waterworks department of Kansas City, Mo., performed by one Dock Wilson. The defendant was the auditor of Kansas City, and refused to give to relator, as such assignee, a city warrant for said sum. The relator thereupon instituted this proceeding by mandamus to compel the delivery of the warrant. The trial court granted the writ and the city appealed. The refusal of the city auditor was based upon an ordinance of the city prohibiting an assignment of wages or salary. The court held that such ordinance had the force of a contractual provision as between the city and the laborer, and held the assignment void on that basis, saying in part:

"It therefore comes to this question, is it a valid contractual provision to insert in a con-

tract with a municipality that a claim for the wages arising thereunder shall not be assigned? We think that it undoubtedly is. *City of Omaha v. Standard Oil Co.*, 55 Neb. 337, 75 N. W. 859; *Burek v. Taylor*, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578. While the right to assign a matured claim may be a fundamental right existing in the owner of the claim, as contended by relator, it does not follow that he may not curtail such right by contract. And so it is said that: 'A contract to pay money may doubtless be assigned by the person to whom the money is payable, *if there is nothing in the terms of the contract* which manifests the intention of the parties to it that it shall not be assignable.' *Delaware Co. v. Diebold Safe Co.*, 133 U. S. 473, 478, 10 Sup. Ct. 399, 33 L. Ed. 674. 'At the present day, no doubt, an agreement to pay money or to deliver goods may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether requiring something to be afterwards done, or by some other stipulation which manifests the intention of the parties that it shall not be assignable.' *Arkansas Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 387, 8 Sup. Ct. 1308, 32 L. Ed. 246. A right which, for a consideration, is contracted away, is not any longer a right to be asserted by the contractor. **The agreement in this case was that the city would pay to Wilson a stipulated sum per day if he would do certain work, and surrender his right of assignment of his claim for such work to a third party. Wilson had as much legal capacity to agree to forego his ordinary right of assignment, as he had to agree to perform the labor itself."**

In page 18 of appellant's brief, appellant refers to (g) *City of Omaha v. Standard Oil Company*,

supra, and *Murphy v. City of Plattsmouth*, and states that these cases are to be distinguished from the one at bar in that both of these cases involved contracts executory on both sides. It is submitted that this statement is not true. In *City of Omaha v. Standard Oil Company* the matter involved was the October installment of the moneys owed by the City of Omaha to the Metropolitan Street Lighting Company. The court in this case, speaking on this point, said:

"It may be conceded that while a contract right to render personal services cannot be assigned without the consent of the person to whom the services are due, the right to receive pay for such services when rendered stands upon a different ground and is assignable in the absence of a statute or stipulation in the contract forbidding it \* \* \* and the validity of such an assignment, it seems, does not at all depend upon the money being presently due and payable. If the fund has a potential existence (that is if it will become due in the future under the terms of a contract already made), the assignment vests an equitable title thereto in the assignee prior to all prior charges \* \* \* so the assignment of the October installment was valid and the plaintiff acquired an equitable property therein unless the right to assign was prohibited by the contract itself."

The court then proceeds to find that the contract itself did prohibit such an assignment and rendered the same invalid. This case did not go off on the ground that the contract was executory. The decision in the case was based upon the

grounds that the contract with the municipality expressly prohibited the right to assign moneys due under the contract. In *Murphy v. City of Platts-mouth*, the contract was not executory in so far as the contractor was concerned. The contract had been completed by the contractor and all that remained to be done was the payment of the moneys due by the city. So, too, the case of *State ex rel. Kansas City Guarantee Co. v. Kent* involved a contract that was executed in so far as the contractor was concerned, and was executory only so far as the city had failed to pay the money due thereunder.

It is submitted that these authorities establish the proposition that a municipality may validly contract so as to limit the power of its obligee to assign the obligation against the municipality without its consent. A municipality would have this power even if it be conceded that the power did not generally exist. The purposes of the institution of municipal corporations is to act as administrative agencies for the State and to provide for police and local government. They exist merely for the public welfare and should be allowed to avoid consuming the time of their officers and the moneys in the treasuries in defending vexatious and expensive litigation in which it has no personal interest whatsoever.

Therefore, we conclude that a provision in a contract between a municipality and another, rendering a claim for moneys due from the munici-

pality unassignable without the consent of the municipality, is valid.

---

## II.

**A PROVISION RENDERING MONEYS DUE UNDER A CONTRACT UNASSIGNABLE EITHER LEGALLY OR EQUITABLY IS NOT MERELY FOR THE BENEFIT OF THE MUNICIPALITY, BUT RENDERS INVALID AN ATTEMPTED ASSIGNMENT, WITHOUT SUCH A CONSENT.**

**A. This Rule Has Been Established by the Supreme Court of the United States.**

Appellant devotes the greater portion of his brief to the establishment of the proposition that the provision in the contract, that the contractor shall not either legally or equitably assign any of the moneys payable under the contract, was inserted for the sole benefit and protection of the city and not for the benefit of anyone else. The Supreme Court of the United States has directly passed upon this proposition in *Burck v. Taylor*, (a) supra.

In that case it was contended by counsel that such a provision was solely for the benefit and protection of the State or municipality, and the benefit of the same cannot be claimed by anyone but the municipality. The court in that case carefully considered and examined the contention of counsel, and decided expressly that the provision could be availed of not only by the State but by anyone else. It found that any assignment made without the consent of the State or municipality



was absolutely void, and created no rights in the assignee, save possibly an individual and personal liability on the part of the assignor to the assignee.

Appellant seeks diligently to distinguish the case of *Burck v. Taylor*, and on page 20 of his brief says in relation to the decision in *Burck v. Taylor*—"that decision cannot be correctly apprehended by reading isolated extracts from it". Appellant then gives an extract of 28 lines from page 645 to 646, and then on page 21 of his brief gives an extract of the same length from page 650 to 651 of the opinion of the court. Appellant, however, omits entirely four pages of the decision which passes directly on the point at issue. He starts out by advising us that we cannot correctly apprehend the decision by reading isolated extracts therefrom, and then attempts to explain the decision on the basis of two small isolated extracts. The contention that the prohibition of assignment, without the written consent of the State or municipality was merely for the benefit of the State or the municipality, was directly presented to the court in that case. On page 646 the court says:

"It is earnestly insisted by counsel that this provision forbidding an assignment without the written consent of the state authorities was solely for the benefit and protection of the State; that it did not restrict or interfere with the right of the contractor to dispose, in any way he saw fit, of an interest in the contract, or the profits thereof, so long as the party to whom such transfer was made attempted no in-

terference with the actual work, and presented no claim against the State. The contract in the possession of the contractor was his property, and the profits arising therefrom, and any interest therein, were as much the subject of disposal as any other property, *and the only limitation was one for the benefit of the State and could not be claimed by any subsequent assignee from the contractor.*"

In the face of this language how can it be doubted that the court in *Burck v. Taylor* directly passed on the question of whether such a provision was for the sole benefit of the State? The court continues:

"The case of *Hobbs v. McLean*, 117 U. S. 567, 576, is relied upon as authority for this contention. In that case one Peck having, in response to an advertisement from the proper authorities, put in a bid for furnishing wood and hay to the government and expecting that the contract would be awarded to him, entered into a partnership with McLean and Harmon, by which Peck was to furnish one-half of the capital necessary to carry on the partnership business, and McLean and Harmon each one-fourth, the profits and losses of the partnership to be divided in like proportion. The partnership was for the purpose of carrying out this expected contract. Subsequently, the contract with the government was obtained, and after it had been performed and the money therefor paid to an assignee in bankruptcy of Peck, the other partners, McLean and Harmon, filed their bill to recover their proportionate share of the profits as fixed by the terms of this partnership. Among the defences was that the partnership was invalid by reason of section 3737, Revised Statutes, which reads as

follows: 'No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.'

But this defence was overruled, the court, by Mr. Justice Woods, observing in respect thereto:

'Interpreting the articles in the light of the statute, as it is the duty of the court to do, they were not intended to transfer, and do not transfer, to the plaintiffs any claim or demand, legal or equitable, against the United States, or any right to exact payment from the government by suit or otherwise. They may be fairly construed to be the personal contract of Peck, by which, in consideration of money to be advanced and services to be performed by the plaintiffs, he agreed to divide with them a fund which he expected to receive from the United States, on a contract which he had not yet entered into. This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can be held to effect a transfer of Peck's contract with the United States, and to be a violation of the statute.

We are of the opinion that the partnership contract was not opposed to the policy of the statute. The sections under consideration were passed for the protection of the government. *Goodman v. Niblack*, 102 U. S. 556. They were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement

made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed.'

It is insisted that, tested by the rule thus laid down, this stipulation of clause 26 was one solely for the benefit of the State, and worked no restriction on the right of the contractor to dispose, in advance of the completion of the contract, of the profits which should enure therefrom.

We cannot concur in these views. By the section quoted not only was a transfer of the contract prohibited, but also the result of such forbidden transfer declared. In terms it was said that any 'such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned'. *Expressio unius est exclusio alterius*. The express declaration that so far as the United States are concerned a transfer shall work an annulment of the contract, carries, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the government is concerned, and it alone can raise any question of the violation of the statute. The government in effect, by this section, said to every contractor, you may deal with your contract as you please, and as you may deal with any other property belonging to you, but so far as we are concerned you, and you only, will be recognized either in the execution of the contract, or in the payment of the consideration. It is familiar law that not every contract in contravention of the terms of a statute is void, and the courts will search the language of the statute to see whether it was the intent of the makers that

a contract in contravention of it should be void or not. *Harris v. Runnels*, 12 How. 79; *Miller v. Ammon*, 145 U. S. 421; *Pangborn v. Westlake*, 36 Iowa, 546.

It was in pursuance of this line of thought that the court, in *Hobbs v. McLean*, ruled as it did as to the effect of a transfer by a contractor with the United States of an interest in his contract to a third party. But it has never been doubted that, as a general rule, a contract made in contravention of a statute is void and cannot be enforced, and the only exception arises when, from an examination of the statute, the courts are able to discern a different or a limited purpose on the part of the law makers."

It is true that in the quotation just given the court was dealing with the construction of the statute. It is true that in the case at bar we have no construction of a statute—we are construing the terms of a contract, but it is equally true that the very next words of Mr. Justice Brewer recognize that fact. His opinion continues:

"It is true that, in the case at bar, we have no construction of a statute, but only of the terms of a contract. That contract, however, was as binding on the one party as the other. The contractor assented to its terms precisely as did the State, and his promise was not to assign the contract in whole or in part without the consent in writing of the state authorities. *It was a promise which entered into and became one of the terms of the contract, and one which was binding, not only upon the parties, but upon all others who sought to acquire rights in it. It may be conceded that, primarily, it was a provision intended, although not*

*expressed, for the benefit of the State, and to protect it from interference by other parties in the performance of the contract, to secure the constant and sole service of a contractor with whom the State was willing to deal, and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interests in the contract it had no previous knowledge, and to the acquisition of whose interests it had not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him."*

What language could be plainer—what language could be stronger to the effect that such a provision of contract could not only be availed of by the State or municipality, but could also be availed of by anyone else? Clearly, the Supreme Court of the United States has gone on record in this case that a provision prohibiting the assignment of a contract without consent rendered an attempted assignment invalid and ineffectual, not only as to the State or municipality, but also as to all other parties.

Before the Circuit Court of Appeals appellant made a similar contention to that made here. Before the Circuit Court he contended that a provision against assignment is intended for the benefit of the city alone and no one else can complain of its breach, but the Circuit Court rejected the contention of appellant on the authority of *Burck v. Taylor*, saying in part:



"It is contended further that such a provision against assignment is intended for the benefit of the city alone, and that no one else can complain of its breach. *Fortunato v. Pat-ten*, 147 N. Y. 277, 41 N. E. 572, is cited as a case in which it was so held. But in *Burck v. Taylor*, 152 U. S. 635, 14 Sup. Ct. 696, 38 L. Ed. 578, where a contract with a state for the erection of a public building was made unassignable by express stipulation, it was held that an attempted transfer of an interest in the contract without the state's consent was ineffectual further than to give a right of action against the contractor for a measure of the profits. It is argued, however, that that case is to be distinguished from the case at bar in that there was an absolute covenant on the part of the contractor in that case that the contract should not be assigned in whole or in part without the consent of the state. But the contract in the present case having been assented to in all its terms by the contractor is as binding upon him as if his obligations had been affirmatively expressed in a covenant to abide by the same."

The court then went on to quote the following language of *Burck v. Taylor*:

"It may be conceded that primarily, it was a provision intended, although not expressed, for the benefit of the state, and to protect it from interference by other parties in the performance of the contract, to secure the constant and sole service of a contractor with whom the state was willing to deal, and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interest in the contract it had no previous knowledge, and to the acquisition of whose interests it had

not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him."

The court further said:

"We see no reason why this provision of the contract under consideration shall not be given the meaning and effect which its words import. It plainly stipulates against the assignment of the payments. There must have been substantial grounds for embodying such a provision in the contract. We may assume that one of the purposes, and probably the principal purpose thereof, was to protect subcontractors in their equitable rights to the unpaid funds in the hands of the city in case notice should be given under section 1184, and to afford such subcontractors better opportunity to secure payment for that which they might contribute to the work which was under construction, as well as on behalf of the city to avoid the possible complications and litigation that might attend the transfer to another of the payments accruing under the contract."

From these authorities it appears evident that this court has squarely decided that a provision in a contract between a State or municipality and a contractor, prohibiting the assignment of moneys due under the contract, is not merely for the benefit of the public body, but may be taken advantage of by anyone. The question was squarely presented and recognized in *Burck v. Taylor*, supra, the court there deciding that the validity of the assignment without the required consent could be questioned by anyone.

**B. Interest of Municipality Demands that Subcontractor be Protected Against Assignments of Moneys Without Consent of Municipality.**

The appellee, Welles, the subcontractor of the contract between the Board of Public Works of San Francisco and the Metropolis Construction Company, is not in the position of a disinterested third person who is seeking to avoid the effect of the inhibition of assignment of moneys by some technicality. The equities in this case are strongly in favor of the appellee, Welles. It was the money, the property and engineering skill of the appellee, Welles, that created the fund here in controversy. The subcontract in favor of appellee, Welles, is uncontested by anyone and was recognized as valid by the referee in bankruptcy (Tr. pp. 150-151).

The *fourth* progress payment was not the final payment under the contract, but accrued during construction and before the completion of the work called for by the contract. The *fifth* progress payment, amounting to over \$11,000, was the final payment (Tr. p. 149). In making the contract, the city had in view the fact that some and perhaps much of the work to be done would be performed by subcontractors, for the contract expressly provides for the assignment of parts of the contract (Tr. p. 136), with the consent of the municipal authorities. The record shows that the Metropolis Construction Company had several other contracts with the city for the construction of sewers (Tr. pp. 139-140). It was obviously of

the very highest importance to the city that a subcontractor, engaged in the construction of this work, should not be embarrassed, financially or otherwise, in executing the city's work. The contract provided for and contemplated progressive payments by the city (Tr. p. 135). The purposes of this provision are apparent. One of these purposes was to permit the contractor to carry on and complete the work with a smaller amount of capital than would be required if the contractor had to wait for his money until final completion and acceptance of the work. So, with a subcontractor, he was not obliged to have on hand, at the outset, sufficient capital to carry through his subcontract to completion, but could depend upon the progressive payments with which to finance the next installment of the work. If, when any progressive payment is due, the subcontractor is disappointed in receiving his compensation therefrom, because that particular progressive payment has been assigned by the contractor to a bank, the subcontractor might be so embarrassed as not to be able to go on with his contract and the work would be brought to a standstill. This might mean that one of the city's main thoroughfares might be all torn up and must necessarily remain so torn up for a considerable period of time until the city authorities can pursue other means for the completion of the work. This contingency, not at all unlikely, would

greatly inconvenience the municipal government. Furthermore, it would be highly detrimental to the comfort and financial welfare of the inhabitants of the city, not alone those whose places of business or residence fronted upon the street upon which this traffic had been brought to a standstill, but as well those having occasion to use the street at all.

It cannot, therefore, be said that the city did not have in mind the interests of the subcontractor in framing the provision against assignment of the moneys due under the contract, for the interest of the subcontractor was the interest of the city. In this particular case, it was the *fourth* progressive payment that was assigned. The appellee, Welles, had a right to assume, from the terms of the contract, that the fourth progressive payment would not be assigned and that he could count on receiving therefrom the money with which to complete that portion of the city's work which he had contracted to do. The record here shows that the contractor was thrown into bankruptcy while this work was in progress and that the appellee, Welles, had to complete, and did complete his contract with the city in conjunction with the temporary receivers appointed by the court and thereafter in conjunction with the trustee of the bankrupt's estate (Tr. pp. 138, 149).

The interest of the city demanded that Welles be unhampered in completing the work he had un-

dertaken to do. The city not only wanted the work done and well done, but it was most important that the work be done expeditiously and without interruption. It was a paramount consideration to the city that the contractor should not divest itself of the fund, earned and created by the subcontractor, upon which the subcontractor relies for the completion of the city's work.

The provision in question is not against public policy, while on the other hand the public interest demands that such a provision be enforced to the letter.

Furthermore, the appellant must be charged with notice of the terms of the contract at the time it took the assignment. The contract was between the Board of Public Works, acting as the agent and on behalf of the City and County of San Francisco, and the Metropolis Construction Company. It was, therefore, a public contract and a public record. Therefore, anyone taking an assignment of any interest under the contract would be charged with notice of the terms of the contract, and the contract expressly prohibiting any assignment, legal or equitable, of the moneys due under the contract. Knowledge of the invalidity of an attempted assignment must, therefore, be imputed to the appellant at the time it took the purported assignment. Therefore, it would seem that the equities in the case are not with appellant.



In conclusion appellees contend:

First, that a provision in a contract between a municipality and another rendering a claim for moneys due from a municipality unassignable without the consent of the municipality, is valid. We have seen that the general rule is that parties to a contract may validly provide that it shall not be assigned, and that such a provision is not a restraint on alienation. It is apparent that the insurance cases cited by appellant are not in point, but that parties may validly prohibit assignment of moneys due under a contract, and we have seen that there are additional and further reasons for holding that in contracts of municipalities prohibition of assignments of moneys due thereunder should be sustained, in that such assignment enables the city to avoid taxation and expense of litigation.

Secondly, that a provision rendering moneys due under a contract unassignable, either legally or equitably, is not merely for the benefit of the municipality, but renders invalid an attempted assignment of such a consent. This rule has been established by this court in the case of *Burck v. Taylor*, which has been followed in a number of jurisdictions.

Finally, the interest of the municipality demands that a subcontractor be protected against assign-

ments of moneys without the consent of the municipality.

Dated, San Francisco,  
May 24, 1916.

Respectfully submitted,

F. H. DAM,

R. T. DEVLIN,

W. H. DEVLIN,

*Attorneys for Appellee,  
Paul I. Welles.*

GEORGE J. HATFIELD,  
*On the Brief.*

A. F. MORRISON,

P. F. DUNNE,

W. I. BROBECK,

MILTON J. GREEN,  
*Attorneys for Appellee,  
John Daniel, as Trustee, etc.*

does not render absolutely void an assignment of money due and payable under the contract, made by the contractor to a bank for valuable consideration but without such consent; nor prevent the passing of a prior title as against the right of a subcontractor who subsequently took the steps prescribed by § 1184 of the California Code of Civil Procedure for the sequestration of the same indebtedness—it appearing that the city did not object to the assignment or favor either claimant. *Burck v. Taylor*, 152 U. S. 634, distinguished. 211 Fed. Rep. 561; 215 Fed. Rep. 81, reversed.

The case is stated in the opinion.

*Mr. William R. Harr*, with whom *Mr. George A. Knight*, *Mr. Charles J. Heggerty*, *Mr. James B. Feehan*, *Mr. Joseph W. Beretta* and *Mr. Charles H. Bates* were on the briefs, for appellant.

*Mr. Harold Remington*, with whom *Mr. F. H. Dam*, *Mr. R. T. Devlin*, *Mr. W. H. Devlin*, *Mr. A. F. Morrison*, *Mr. P. F. Dunne*, *Mr. W. I. Brobeck*, *Mr. Milton J. Green* and *Mr. George J. Hatfield* were on the brief, for appellees:

I. The provision in the contract to control assignments of moneys due was valid. *Burck v. Taylor*, 152 U. S. 634, and many other cases were cited to the general proposition that parties to contracts may prohibit assignment. The prohibition may extend to the assignment of moneys due under the contract. *Tabler v. Sheffield Land, Iron & Coal Co.*, 79 Alabama, 377; *Stanley v. Sheffield Land, Iron & Coal Co.*, 83 Alabama, 261; *Barringer v. Bes Line Construction Co.*, 23 Oklahoma, 131; *Zetterlund v. Texas Land &c. Co.*, 55 Nebraska, 355; *Omaha v. Standard Oil Co.*, 55 Nebraska, 337; *Murphy v. Plattsmouth*, 78 Nebraska, 163; *State ex rel. Kansas City Loan Guarantee Co. v. Kent*, 98 Mo. App. 281. The assignment, when so forbidden, merely creates a personal obligation between assignor and assignee.

Such provisions are not invalid as restraining alienation.

242 U. S.

Opinion of the Court.

California Civil Code, § 711, which is but declaratory of the common law (*Murray v. Green*, 64 California, 363), merely discountenances such restraints as are inconsistent with the interest created. The restraints which are obnoxious concern real estate (*Murray v. Green*, *supra*), or other tangible property (*Bradley v. Piezotto*, 3 Ves. Jr. 324). The rule against restraint is never applied to avoid provisions against assigning contracts contained in the contracts themselves. *La Rue v. Groezinger*, 84 California, 281. Cases in which claims against insurance companies after loss have been held assignable despite stipulations to the contrary are to be distinguished upon the ground that insurance contracts are in a peculiar way construed in favor of the insured. Otherwise, such decisions are clearly contrary to the general rule and great weight of authority.

There are especial reasons for upholding such prohibitions in favor of municipalities. On grounds of public policy they are exempted from garnishment and judicial seizure of municipal revenues for debts, 1 Dillon Municipal Corporations, 5th ed., §§ 248, 249; with equal or better reason should they be exempted from suits on assigned obligations. *Omaha v. Standard Oil Co.*, *supra*; *Murphy v. Plattsmouth*, *supra*; *State ex rel. Kansas City Loan Guarantee Co. v. Kent*, *supra*.

II. The provision against assignment was not merely for the benefit of the city, but rendered the assignment absolutely void unless the city consented. *Burck v. Taylor*, *supra*.

The interest of the municipality demands that subcontractors be protected against assignments.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the appellee Welles to establish a lien upon a debt of \$6,830.85 due under a construction

**PORTUGUESE-AMERICAN BANK OF SAN  
FRANCISCO *v.* WELLES.**

**APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE  
NINTH CIRCUIT.**

**No. 45. Argued October 27, 1916.—Decided November 13, 1916.**

A provision in a contract between the City of San Francisco and a construction company declaring that the company shall not, either legally or equitably, assign any moneys payable thereunder or its claim thereto, unless with the consent of the Board of Public Works,

contract from the City of San Francisco, represented by the appellee Boyle, to the bankrupt, Metropolis Construction Company. The District Court approved the report of the referee against the claim and in favor of the appellant, but this decree was reversed by the Circuit Court of Appeals. 211 Fed. Rep. 561. 215 Fed. Rep. 81. 128 C. C. A. 161. 131 C. C. A. 389. The subject-matter is the fourth progress payment, which on December 5, 1910, had been authorized by the Board of Public Works of the city. On that day the Construction Company applied to the appellant bank for a loan of \$30,000 secured by an order on the auditor of the city authorizing the bank to draw from the city for the above and other amounts not in controversy here. The bank declined until the order should be accepted by the auditor whereupon on the next day the order was presented to the auditor's office and stamped as received on December 6. The order was intended and taken as an assignment and after it had been stamped was accepted by the bank as security and the money was advanced. The next day \$5,000 more was advanced on the same security, notes being given for each sum. The appellee Welles was a subcontractor, and on December 12 and 16 served notice on the city to withhold payment, as permitted by § 1184 of the Code of Civil Procedure of the State of California. It is admitted by Welles that if the assignment was valid his rights are subordinate to it, *Newport Wharf & Lumber Co. v. Drew*, 125 California, 585, and the only question argued on his behalf is whether the terms of the contract between the bankrupt and the city made the assignment void.

The contract provided that the contractor should keep the work under his personal control and should not assign or sublet the whole or any part thereof without the consent of the Board of Public Works. It further declared that no subcontract should relieve the contractor of any



of his obligations and that he should not "either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent." The city has made no objection to the assignment to the bank and the money now awaits the decision of this court as between the claimant of the lien and the prior assignee.

There is a logical difficulty in putting another man into the relation of the covenantee to the covenantor, because the facts that give rise to the obligation are true only of the covenantee—a difficulty that has been met by the fiction of identity of person and in other ways not material here. Of course a covenantor is not to be held beyond his undertaking and he may make that as narrow as he likes. *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379. But when he has incurred a debt, which is property in the hands of the creditor, it is a different thing to say that as between the creditor and a third person the debtor can restrain his alienation of that, although he could not forbid the sale or pledge of other chattels. When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse. It is not illogical to say that the debt is as liable to sale as it is to the acquisition of a lien. To be sure the lien is allowed by a statute subject to which the contract was made, but the contract was made subject also to the common law, and if the common law applies the principle recognized by the statute of California that a debt is to be regarded as a thing and therefore subjects it to the ordinary rules in determining the relative rights of an assignee and the claimant of a lien, it does nothing of which the debtor can complain. See further, Cal. Civil Code, §§ 954, 711. The debtor does not complain, but stands

indifferent, willing that the common law should take its course.

The Circuit Court of Appeals relied largely upon *Burck v. Taylor*, 152 U. S. 634, some expressions in which, at least, seem to warrant the conclusion reached. But that case as understood by the majority of the court was quite different from this. A contract for the building of the Capitol of Texas was made not assignable without the consent of the Governor and certain others. The contractor assigned an undivided three-fourths interest to Taylor, Babcock & Co., with the required assent and then three-sixteenths without assent to three others severally, one of whom conveyed one thirty-second to the plaintiff. The contractor made another conveyance of all his rights under the contract to Taylor, Babcock & Co., and Taylor, Babcock & Co. made what purported to be a transfer of the entire contract to Abner Taylor, the defendant. Both of these transfers were assented to. In the latter Taylor purported to bind himself to the State to perform the original contract and in the assent to the same the Governor and other authorities stated that they recognized Taylor as the contractor, bound as the original contractor was bound. The court held that there was a novation, p. 650, and that Taylor acted without notice of the plaintiff's claim, p. 653. Upon those facts it would be hard to make out any right of the plaintiff to proceeds of the new contract that Taylor had performed.

The assignability of a debt incurred under a contract like the present sometimes is sustained on the ground that the provision against assignment is inserted only for the benefit of the city. Whether that form of expression is accurate or merely is an indirect recognition of the principle that we have stated, hardly is material here. It is enough to say that we are of opinion that upon the facts stated the assignment was not absolutely void, that therefore the bank got a title prior to that of Welles and con-

242 U. S.

Syllabus.

sequently that the decree must be reversed. See *Hobbs v. McLean*, 117 U. S. 567. *Burnett v. Jersey City*, 31 N. J. Eq. 341. *Fortunato v. Patten*, 147 N. Y. 277.

*Decree reversed.*

MR. JUSTICE MCKENNA dissents for the reasons stated by the Circuit Court of Appeals.